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EDITOR:
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TABLE OF THE NAMES OF CASES

REPORTED IN

VOL. XII. OF THE WESTERN LAW REPORTER (CANADA.)

(OCTOBER, 1909—JANUARY, 1910.)

A.

Abell, John, Engine and Machine Works Co. v. Porter (Man.), 470.
Adams v. Woods, (Man.), 135, 491.
Adcock v. Manitoba Free Press Co. (Man.), 142, 362.
Allan v. MacEachern (B.C.), 646.
Anderson v. Olson (Sask.), 262.
Andrews v. Pacific Coast Coal Mines Limited (B.C.), 163.

B.

Balton v. Evans (Y.T.), 116.
Banton v. March (Sask.), 598.
Barnes v. British Columbia Copper Co. (B.C.), 68.
Barnet McDonald Lumber Co. v. Union Steamship Co. (B.C.), 642.
Bashford v. Bott (Sask.), 428.
Baxter v. Senkler (Y.T.), 463.
Belcher v. Hudsons Limited (Sask.), 25.
Binette, Re (Y.T.), 730.
Blundell v. Anglo-American Fire Insurance Co. (B.C.), 164.
Boyd v. Naismith (Sask.), 233.
Brooks, Re (Sask.), 303.
Brownsberger v. Harvey (Sask.), 596.
Brox v. Edmonton Yukon and Pacific R. W. Co. (Alta.), 176.
Buchanan v. City of Winnipeg (Man.), 613.
Burton v. Merchants Bank of Canada (Sask.), 239.

C.

Calgary and Edmonton R. W. Co. and McKinnon, Re (Alta.), 554.
Campbell v. National Construction Co. (B.C.), 152.
Canada Furniture Co. v. Stephenson (Man.), 603.
Canada Law Book Co. v. Fieldhouse (Alta), 396.
Canada Life Assurance Co. v. Vance (Sask.), 231.
Canada Permanent Mortgage Corporation v. Martin (Sask.), 440.
Canadian Bank of Commerce v. Donoghue (Y.T.), 30.
Canadian Pacific R. W. Co. v. Forest City Paving and Construction Co. (Sask.), 229.
Case (J. I.) Co. v. Preston (Sask.), 12.
Cockshutt Plow Co. v. Gray (Sask.), 435.
Confirmation of Local Improvement Tax Return, Re (Alta.), 573.
Coward Investment Co. v. Lloyd (Man.), 497.
Cross v. Cross (Sask.), 433.
Cross v. Douglas (Sask.), 273.
Cuthbert v. Campbell (B.C.), 219.

D.

Darnley and Canadian Pacific R. W. Co., Re (B.C.), 67.
De Jardin v. Roy (Sask.), 704.
Dodulitz v. Krainean (Sask.), 1.
Dominion Express Co. v. City of Brandon (Man.), 498.
Drury v. Dart (Man.), 520.

E.

Eaton v. Crook (Alta.), 658.
Edinger v. McDougall and York (Alta.), 82.
Edmonton Concrete Co. v. Cristall (Alta.), 562.

F.

Fernie v. Kennedy (Man.), 48.
Foster v. Stiffler (Man.), 60.
Fox v. Hunter (Alta.), 87.

G.

Gaar Scott Co. and Giguère, Re (Sask.), 245.
Gamble v. Arnold (Sask.), 91.
Georges & Son v. Kidd (Alta.), 398.
Goldstein v. Vancouver Timber and Trading Co. (B.C.), 154.
Gowan v. Kolcheu (Alta.), 211.
Grand Trunk Pacific R. W. Co. v. Vincent (Alta.), 403.
Gwillam v. Lott (Sask.), 4.

H.

Hall v. City of Moose Jaw (Sask.), 693.
Hatch v. Rathwell (Man.), 141, 376.

Houlihan v. Yukon District Gold Mining Co. (Y.T.), 110.
Howard v. Lawson (Man.), 213.
Hudson v. Fletcher (Sask.), 15.
Hyndman, Re (Alta.), 166.
Hyndman v. Stephens (Man.), 46.

I.

Imperial Bank of Canada v. Georges & Son (Alta.), 398.
Imperial Bank of Canada v. Kievell (Sask.), 308.
Isbister v. Dominion Fish Co. (Man.), 508.

J.

Jagger v. Turner & Co. Limited (Sask.), 588.
Johnson v. Canadian Northern R. W. Co. (Man.), 124.
Johnson v. Chalmers (Man.), 506.
Jones v. Morris (Alta.), 651.

K.

Kasindorf Brothers v. Hudson Bay Insurance Co. (Sask.), 285.
Keizer v. Keizer (Alta.), 89.
Kelly v. City of Winnipeg (Man.), 49.
Kelly v. Kelly (Man.), 365.
Kerruish v. Senkler (Y.T.), 324.
Kruz and Crow's Nest Pass Coal Co., Re (B.C.), 158.

L.

Lankin v. Walker (Sask.), 320.
Lareau v. Olsen (Y.T.), 462, 465.
Larkin v. Polson (Man.), 144, 491.
Little v. Whiteley (Alta.), 211.
Lloyd v. Nicholas (Y.T.), 38.

M.

McCallum v. Russell (Sask.), 267.
McCormick v. Canadian Pacific R. W. Co. (Man.), 363.
Macdonald v. Brown (Sask.), 713.
McDougall & Secord v. Inglis (Alta.), 78.
McKeague v. Great West Construction Co. (Man.), 355.
Mackenzie v. Newman (Man.), 631.
McKinley v. Frank (Man.), 498.
Massey-Harris Co. v. Graham (Sask.), 593.
Maybery v. Williams (Sask.), 689.
Miller v. Ross (Sask.), 315.
Mitchell v. Rutherford (Man.), 55.
Moore v. McKibbon (Man.), 358.
Moose Mountain Lumber and Hardware Co. v. Paradis (Sask.), 310, 424.
Morin v. Anglo-Canadian Fire Insurance Co. (Alta.), 387.
Morris v. Sobey (Alta.), 558.
Morrison v. Bryan (Sask.), 415.
Moseley v. Ketchum (Sask.), 721.
Murray and Foley, Re (Alta.), 537.

N.

Nelson v. Nelson (B.C.), 150.
Newton v. Rein (Man.), 490.
Northern Constructions Limited, Re (Man.), 618.
North-West Telephone Co., Re (Sask.), 300.

O.

Oliphant v. Fisher (B.C.), 636.
Olsen v. Desjarlais (Y.T.), 455, 467.
Onsum v. Hunt (Alta.), 680.
Outlook Hotel Co. Limited, Re (Sask.), 181.

P.

Paterson v. Houghton (Man.), 330.
Pempeit v. Canadian Northern R. W. Co. (Alta.), 384.
Perry v. Kidd (Sask.), 9.
Pioneer Fruit Co. v. Litschke (Sask.), 94.
Plested v. McLeod (Sask.), 700.

R.

Regina, City of v. Garrett (Sask.), 96.
Reinholz v. Cornell (Sask.), 121.
Rex v. Council of the District Municipality of North Saanich (B.C.), 639.
Rex v. Dubois (Alta.), 560.
Rex v. Duff (Sask.), 290.
Rex v. Law (Man.), 475.
Rex v. Pepper (Man.), 58.
Rex v. Prasiloski (B.C.), 162.
Rex v. Raffenberg (No. 1) (Sask.), 419.
Rex v. Raffenberg (No. 2) (Sask.), 421.
Rex Fruit Co. v. Anderson (Alta.), 167.
Richards v. Verrinder (B.C.), 527.
Richelieu Hotel License, Re (Alta.), 72.
Robertson v. Hopper (Sask.), 5.
Rose v. Collison (Alta.), 648.
Rowes v. Christie (Man.), 497.
Royal Trust Co. v. Bell (Alta.), 546.
Royce v. Municipality of Macdonald (Man.), 347.

S.

St. Germain v. Reneault (Alta.), 169.
Saltman v. McColl (Man.), 146.
Saunders and Marshall v. Tomlinson (Alta.), 73.
Sawyer-Massey Co. v. Bennett (Sask.), 249.
Shaefer v. Schwab (Man.), 338.
Schweiger Co. v. M. Vineberg Co. (Man.), 515.
Scott v. Canadian Pacific R. W. Co. (Man.), 328.
Shaw v. City of Winnipeg (Man.), 622.
Sherritt v. McCallum (B.C.), 637.
Shillinglaw v. Whillier (Man.), 128.
Simpson v. Wildrig, Re (B.C.), 643.
Smith v. Sugarman (Alta.), 585.
Smithneseki v. Wiltsie (Alta.), 533.

Solicitors, Re (N.W.T.), 687.
Somerville, Re (Man.), 633.
Stephens v. City of Calgary (Alta.), 379.
Stewart v. City of Winnipeg (Man.), 613.
Sutton v. Hinch (Man.), 500.

T.

Tapoila v. Harding (Y.T.), 188.
Thompson v. Pepper (Man.), 490.
Throssel, Re (Alta.), 683.
Timmons v. National Life Assurance Co. (Man.), 492.
Timms v. Timms (B.C.), 529.
Trotter and Douglas v. Calgary Fire Insurance Co. (Alta.), 672.
Tuckett Cigar Co. v. Wickett (Alta.), 210.

U.

Union Bank of Canada v. Cross & Everard (Alta.), 539.
Union Investment Co. v. Perras (Alta.), 76.

V.

Vachon v. Lefebvre (Y.T.), 203.
Varley v. Duvall (Alta.), 378.
Vernon Fruit Co. v. Canadian Pacific R. W. Co. (Sask.), 445.
Vonda, Town of, and Mantyka, Re (Sask.), 222.
Von Ferber v. Enright (Man.), 216.

W.

Waltenbaugh v. The "Pauline" (Ex. Ct. of Can.), 206.
Waterous Engine Works Co. v. Wells (Sask.), 706.
Watson v. Jamieson (Aita.), 667.
Williams v. McDougall (Alta.), 381.
Wilson v. Gallagher (Alta.), 75.
Wilson v. Kelly (B.C.), 160.
Wirth v. Cook (Sask.), 102.
Wood v. Barker (Sask.), 225.
Woodward v. City of Vancouver (B.C.), 156.
Worsley v. Brunton (Alta.), 531.
Wray v. Canadian Northern R. W. Co. (Sask.), 14, 726.

W

Vol.

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G

J.

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SASKATCHEWAN.

PRENDERGAST, J. OCTOBER 9TH, 1909.

TRIAL.

DODULITZ v. KRAINEAN.

Contracts—Exchange of Properties—Conditions—Account—Claim and Counterclaim—Costs.

Action for an account and other relief.

G. H. Barr, Regina, for the plaintiff.

J. F. Bryant, Regina, for the defendant.

PRENDERGAST, J.:—This action is the outcome of an exchange of property between the plaintiff, who was the owner of a farm near Kronau, and the defendant, who was the owner of a store in Regina, and to the main issue of the conditions of exchange were added other matters in dispute, which resulted in a general reckoning of accounts.

There is nothing to inquire into but questions of fact, and these are such that, except for a few admissions, they must be decided fairly on the credibility of the witnesses. For this reason, while dealing with the different issues singly, I shall do so with but little comment.

The main contract, a verbal one, entered into about 31st July, 1908—whereby the plaintiff's farm near Kronau, with a yoke of oxen and harness, was exchanged for the defendant's store in Regina—was, I find, subject to the following conditions:—

1. The store as bargained for included the stock-in-trade therein contained, the understanding being that the defend-

ant would continue to run the same until 1st September following, when it would be turned over to the plaintiff, and that any increase or decrease which would then be found should be made good by the proper party.

2. The plaintiff was to keep his crop and have the privilege of continuing to live on the farm until the same was reaped, threshed, and sold—without prejudice to the defendant also occupying the farm at once.

3. The plaintiff assumed a mortgage of $225 then existing on the store (all arrears of interest thereon appearing to have been paid till then). He also agreed to reimburse the defendant a just proportion of the fire insurance then in force on the stock and to expire on 1st February, 1909. The defendant, on the other hand, agreed to pay all arrears of taxes on the store and stock to date.

4. The defendant assumed a mortgage of $1,000 on the farm, the plaintiff agreeing to pay interest on same as well as taxes up to 1st November, 1908, in consideration of his continuing to occupy the farm up to that time The defendant also assumed a debt of $104 due one Craig for the said yoke of oxen.

With respect to the items of claim or counterclaim properly coming under the above contract, I adjudge as follows:—

1. As to increase or decrease of stock-in-trade on 1st September. The defendant does not allege in his statement of claim (and has not shewn, although attempting to do so) any decrease. The defendant, on the other hand, has failed to shew an increase, and I consequently disallow an item of $55.50 for flour (paragraph 13 of his counterclaim).

2. As to crop and occupation, etc., this will be dealt with in another aspect.

3. The defendant having failed to pay arrears of taxes on store up to 31st July, 1908, I allow the plaintiff for same $49.20. And the plaintiff having failed to reimburse the defendant a due proportion of the fire insurance premium, I allow the latter $7.60.

4. The plaintiff having failed to pay mortgage interest and taxes on the farm up to 1st November, 1908, I allow the defendant $119.75 and $15.85; and the defendant having failed to pay Craig the amount due on the oxen, which the plaintiff did, I allow the latter $104.

This amounts to: allowed the plaintiff, $153.20; allowed the defendant, $143.20; and disposes of all matters immediately coming under the agreement.

I, moreover, allow the plaintiff on other items:—

(i)	Hay, 4 tons shortage of his share.....	$20.00
(ii)	Board of defendant and wife.....	16.50
(iii)	Sold by deft. at elevator, wheat, $40.40, oats, $16.80.	57.20
(iv)	Oats taken by deft. supposedly for baled hay	40.04
(v)	Plough received by deft. for baled hay....	12.50
(vi)	Cash paid to Mrs. Krainean.....	16.50
	Total	$162.74

I allow the defendant:—

(i)	For store bill.....	$59.40
(ii)	Money lent for change.....	10.00
(iii)	Other money lent.....	9.00
(iv)	Hay sold, 118 bales.....	29.50
(v)	Meals to threshers.....	10.00
	Total	$117.90

The plaintiff is then entitled to $315.94, and the defendant to $261.10, leaving a balance of $54.84, for which there will be judgment for the plaintiff.

As to costs, I will allow the plaintiff costs of the claim, and the defendant costs of the counterclaim, without however allowing either to tax witness fees, as the matters of claim and counterclaim were so interwoven in the evidence that it would be practically impossible to apportion the fees with respect to the same.

I should not close the matter without observing that the case seems to me to be essentially one where reasonable men should adjust their respective claims without the intervention of the Court.

SASKATCHEWAN.

PRENDERGAST, J. OCTOBER 11TH, 1909.

TRIAL.

GWILLAM v. LOTT.

Vndor and Purchaser—Contract for Sale of Land—Mistake of Vendor as to Number of Lot — Action by Purchaser for Specific Performance or Return of Money Paid — Option of Vendor—Election—Interest—Costs.

Action brought by the plaintiff as purchaser against the defendant as vendor for specific performance of an agreement for the sale of lot 3 in block 38 of the Canadian Pacific Railway annex to the city of Regina, and in the alternative for the return of $159.30 paid by the plaintiff on the contract. The plaintiff brought the balance of the purchase price into Court.

The defence was to the effect that the sale was intended to be of lot 18 in block 38, and that the inserting of lot 3 in the agreement was due to mutual mistake of the parties. The defendant asked for rectification of the agreement, and declared himself ready and willing to carry out the terms of the rectified agreement.

J. Secord, Regina, for the plaintiff.

J. F. L. Embury, Regina, for the defendant.

PRENDERGAST, J.:—It would appear from the evidence of G. W. Wagner, called for the defence, that the defendant did not intend to convey lot 3. But it is equally clear from the plaintiff's testimony that he did not want lot 18, because —as he says—he wanted a lot facing east, and lot 18 faces west. The written agreement cannot, then, be altered as prayed for by the defendant.

The position taken by the plaintiff at the trial is that he does not insist on specific performance, and would be satisfied to receive his money back with interest.

Counsel for the defendant having, however, taken the objection that the plaintiff did not rescind, and no evidence of an intention to rescind having in fact been given, it will

be more in order, in the circumstances, to give the defendant the option of either carrying out the agreement sued upon, or paying back the money he has received.

The defendant will have one month to carry out the agreement, in default of which there will be an order against him for the payment of $159.30 together with interest on $100 since 1st February, 1907, and on $59.30 since 1st March, 1908, with costs to the plaintiff.

SASKATCHEWAN.

PRENDERGAST, J. OCTOBER 15TH, 1909.

TRIAL.

ROBERTSON v. HOPPER.

Assessment and Taxes—School Taxes—Distress for Arears—Liability for Taxes—Crown Lands—Interest in—Lawful Seizure of Horses on Land—Excessive Seizure—Damages.

Action for damages for the unlawful seizure for school taxes of 73 head of the plaintiff's horses, made by the defendant Hopper as bailiff for the defendants the trustees of Glen Morris school district No. 436.

E. W. F. Harris, Arcola, for the plaintiff.

A. E. Vrooman, Arcola, for the defendants.

PRENDERGAST, J.:—Although the action purports by the statement of claim to be for unlawful seizure only, I shall treat it also as being for excessive seizure, as this is set out in the plaintiff's reply, and the defendants did not move to have the same struck out, but joined issue thereon.

There were two distress warrants addressed to Hopper by the other defendants on 20th October, 1908, one of them reading as follows: "Distrain the goods and chattels of Hume Robertson in and upon section 29, township 8, range 2, west of the second meridian, in the province of Saskatchewan, and also distrain any goods and chattels found upon the said lands and premises the property of or in the possession of any

other occupant of the said lands and premises, for the sum of $80, being the arrears of school taxes due to Glen Morris school district No. 436 for the years 1902, 1903, 1904, and 1905, by the said Hume Robertson as the occupant of the said lands, together with legal costs, etc."

The other warrant is in the same words, except that "Richard W. Hamill and John Abercrombie" are substituted for "Hume Robertson"—"$120" for "$80"—and "the years 1906, 1907, and 1908" for "the years 1902, 1903, 1904, and 1905."

On 23rd October, pursuant to the said warrants, Hopper proceeded to the said section and seized all the horses thereon, being 75 head, of which 73 belonged to the plaintiff, by locking up the gates of the pasture field in which they were. He appears to have at the same time pasted up on the pasture fence two notices of sale and two inventories (that is to say, one conformably to each warrant), to have served copies of the same on the same day upon the plaintiff as well as Hamill and Abercrombie, and to have also posted up copies of the notices of sale in 4 public places in the district.

With reference to having seized the whole band of horses, Hopper says in evidence: "They were mostly colts . . . they were wild . . . they were all mixed up, and I did not know which was which, whose they were. If there had been two or three I could have taken them, but, as they were, I might have lost some. I thought I was acting in a way to do the least damage."

At all events, on 31st October the sheriff claimed the horses under a writ of replevin, and Hopper thereupon delivered them over to him.

The rolls shew that the plaintiff was assessed for the said section in the years 1902, 1903, 1904, and 1905, and he appears charged therein with $20 each year, making a total of $80, which is the amount claimed in the warrant in which he is named.

The rolls also shew that Hamill and Abercrombie were assessed for this land in the years 1906 and 1908; and they appear charged in 1906 for $39.93, and in 1908 for $40. (The treasurer of the district admitted in evidence that Hamill and Abercrombie were not assessed in 1907). So that the most that they could owe would be, in round figures, $80, and not $120, as the warrant with reference to them calls for.

This section of land, I should say, belongs to the Crown.

Now, the plaintiff says that he for the first time put horses on that land on 12th July, 1902 (which would be about 3 months after the closing of the roll), and that he got no assessment notice for that year; that in 1903 he got notice, but that, having gone to the school house at the time the notice stated the trustees would be there, he found the place locked, and that in 1904 and 1905 he may have had notice, but had only a few horses on the place. He admits, however, having had tax notices for all the years, the last 3 shewing arrears, besides the current taxes, but says that he had complained verbally to the trustees and had been left under the impression that the matter would be arranged. He says also that he stated several times that he would not pay the taxes. The treasurer of the board, on the other hand, says that the plaintiff repeatedly promised to pay the taxes, and the chairman says that he promised to pay them in 1904, but said that he would not in 1906. Be that as it may, he undoubtedly never took an appeal to a justice of the peace under sec. 11 of the Ordinance.

For 1906, 1907, and 1908, of course, the plaintiff received no assessment notice, as the land was then assessed to Hamill and Abercrombie, but I understand the plaintiff to admit that he had horses there in 1906 and 1907, and he surely had there in 1908 the 73 head that were seized.

Allowing that the plaintiff should probably not have been assessed in 1902, he has failed to shew such defects in the preparation of the roll or otherwise as would relieve him of the assessments of 1903, 1904, and 1905, amounting in all to $60. Moreover, although not personally assessed in 1908, he would be liable under sec. 16 of the Ordinance, at least for the taxes of that year, $40, making a total of $100 for which the trustees could levy upon the horses.

The defendant had another objection, which was—as he says he stated to one of the trustees—that he did not rent the place, but just paid pasture to the party who rented it. He said that one Lindsay had the place rented from the Crown in 1902. Who had the place rented subsequently he did not state; nor did he shew, nor attempt to shew, that the conditions under which he paid for pasture would not make him an occupant of the land under the Ordinance. There is nothing in all this that is ground to disturb the assessment for the years I have referred to.

Of course Crown lands cannot be taxed (B. N. A. Act, sec. 125); but it is well settled that one's interest in the same is assessable, although the land itself cannot be sold, and there is no reason why, under sec. 16, personal property situate on Crown lands cannot be seized in satisfaction of the assessment of an interest in such Crown lands, the same as with personal property situate on land of any other class. I may here say that the present case has no analogy with Osler v. Coltard, 6 W. L. R. 636, where the question was whether the taxes imposed on the interest of a homesteader, who subsequently gives up his duties, attach as a lien on the land against a subsequent occupant who in due course becomes patentee.

It seems to me that the seizure here, inasmuch as it was conducted in a regular way, and there were taxes due, even if all the taxes claimed were not due, was not a nullity. The regularity of the proceedings in this case distinguishes it at once from Canadian Canning Co. v. Fagan, 6 W. L. R. 38.

In Tancred v. Leland, 20 L. J. Q. B. 316, it was laid down that distraining for a greater amount of rent than is due is not per se actionable. Of course, this is for rent, and the Distress for Rent Act, 1837, has given to landlords a measure of protection which does not extend to distresses other than for rent. But the reasons given by Parke, B., in the above judgment do not seem based at all on the Distress for Rent Act, and consequently would apply to all kinds of distress.

Nor does the fact that Hopper levied, at the same time and by the one act, also under a warrant against the goods of Hamill and Abercrombie, render the seizure null or irregular: see Governor, etc., of the Poor of the City of Bristol v. Waitt, 3 L. J. M. C. 71.

On the other hand, while the sale of 2 horses, or 3 at the very most, would have satisfied the taxes due and costs, the bailiff seized 75, of which 73 belonged to the plaintiff, and that, of course, notwithstanding Hopper's explanations and reasons for proceeding as he says he did, is an excessive seizure.

The plaintiff, then, cannot recover for trespass, but is entitled to do so for excessive seizure.

I should say, in this respect, that the plaintiff duly made demand to the bailiff for the return of the horses 2 or 3 days after seizure.

The horses were surrendered to the sheriff after about 8 days, which means that Hopper unlocked the pasture gates. Of course the plaintiff was deprived of the possession of the horses for that time; but he has really shewn only the very slightest damages, if any, and it, moreover, does not appear that the defendants were actuated by malice. The plaintiff is, however, certainly entitled to some damages: Chandler v. Doulton, 34 L. J. Ex. 89; and I will assess the same at $20.

There will be judgment for the plaintiff for $20 and costs.

SASKATCHEWAN.

WETMORE, C.J. OCTOBER 19TH, 1909.

TRIAL.

PERRY v. KIDD.

Fraud and Misrepresentation — Sale of Horse—Delivery of Inferior Animal — Promissory Notes Given for Price — Payment after Knowledge of Fraud—Damages—Measure of—Difference in Value — Interest — Money Spent on Training of Horse—Possibility of Profits.

Action for damages for deceit.

N. R. Craig, Moose Jaw, for plaintiff.

J. F. Frame, Regina, for defendants.

WETMORE, J.:—I find the following facts in this case. The plaintiff, in the winter of 1904, purchased from Kidd Brothers a horse by the name of "Carl Klohn." This purchase was effected through one Thompson, the agent of Kidd Brothers. The firm of Kidd Brothers was composed of the defendant W. C. Kidd and Richard T. Kidd, since deceased. Before purchasing this horse, the plaintiff had seen a letter written by the defendant W. C. Kidd to one MacKenzie, describing the horse and stating that he was willing to take $1,000 for him, and that if he kept him until spring and got him ready for racing, he would want $3,000 for him. When the plaintiff interviewed Thompson on the subject he stated that he had seen this letter from W. C. Kidd to MacKenzie,

and gave him the material contents of it. A telegram was sent to Kidd Brothers by the plaintiff and Thompson, and a reply was received in answer. The effect of the two telegrams was that Kidd Brothers offered to sell this horse for $1,000, delivered at Regina, and the plaintiff agreed to re-arrived somewhere about 12th March. He did not arrive at that time, however, but a horse came on 20th April, which the plaintiff had the right to expect and which he believed was "Carl Klohn," and he received the horse under that belief. Two notes were given for the horse, for $500 each, dated 20th ceive and pay that amount for him. The horse was to have April, one payable on 12th September, 1904, and the other on 12th March, 1905. The notes were signed by the plaintiff and his wife, Fanny Perry, and were paid in due course.

It was set up on the part of the defendants that the plaintiff took delivery of this horse knowing that it was not "Carl Klohn," and that he was informed by Thompson that it was not "Carl Klohn." I find against the defendants in that respect. This horse was not "Carl Klohn." It was a horse that went by the name of "Sousa." It was 4 or 5 years older than "Carl Klohn," and was, comparatively speaking, a much inferior horse to what "Carl Klohn" was represented to be. Perry did not discover that this "Sousa" horse had been foisted upon him until some time afterwards. I find that it was not very long after he got him that he discovered that the horse was not the horse he ordered, and I am inclined to think that he paid both notes with the full knowledge that he was not the horse. That, in my mind, however, will not affect his right to recover in this action. I find that there was a deliberate swindle perpetrated upon the plaintiff in this matter. It seems to me that this is very clear from the evidence, and it is not necessary for me to analyse it to establish the reason why I have arrived at the conclusion that this transaction was fraudulent. It is quite sufficient to state that I find that fact, and in my judgment the evidence will bear that out.

The next matter that I have to deal with is that of the damages. In the first place, I have the right to assume from the statements of the plaintiff in his letter to MacKenzie, and from what was stated by Thompson, and the fact that the defendant Kidd sold the horse for $1,000, that "Carl Klohn" was worth that money. The horse "Sousa" that the plaintiff got, he subsequently sold for $300, after keeping him two

years and upwards, but he was quite as good then as when he got him.

I hold the plaintiff to be entitled to recover the difference between the price stated for "Carl Klohn" and that for which he sold "Sousa"—or $700. That, in my opinion, is the damage sustained by the plaintiff naturally arising out of the transaction.

I have been asked, however, to award large damages for money that the horse might have won at races if he had really been "Carl Klohn." That unquestionably is too remote. It does not follow that if the plaintiff had had "Carl Klohn" he would have won first money at these races, as he asserts that he would have done. Racing is a very uncertain business.

In the next place, I am asked to award damages for the expense he was at in training this horse for races and carrying him about to the several race meetings and for expenses of care and keep. I am of opinion that I should not be justified in awarding damages of this character. In the first place. the horse, the first season he went out, won second money on one or two occasions, and he was prevented from racing further that season by having his knee hurt. The second season he won second money now and again and third money, but it seems to me that a horseman (as Perry is) must have soon discovered (if from no other reason than from the indications of the age of the horse) that this was not the 5-year old animal that he had bargained for, and, as before stated, I think he was pretty well satisfied of that fact shortly after he got him. Upon such circumstances he chose to go on training him for races and spending money on his transportation and paying for extra keep that might be occasioned by such training and transportation, and I am of opinion that the defendants are not responsible for damages in this action arising in that way. For somewhat similar reasons I do not feel disposed to award interest in this matter, even assuming that I could do so.

There will be judgment for the plaintiff against the defendant W. C. Kidd for $700 and costs.

The executors of Richard T. Kidd were joined as parties to this action. Probate of the will of Richard T. Kidd was taken out without the jurisdiction of the Surrogate Court of this province or the Supreme Court of the North-West Territories, but it was alleged that the

executors had collected assets in this province belonging to the estate of the testator. It was not shewn that any such assets had been collected; therefore the action, as against them, will stand dismissed. But, inasmuch as all the defendants pleaded jointly, I will allow no costs of the defence to the executors of Richard T. Kidd, merely dismissing the action as against them.

SASKATCHEWAN.

RIMMER, LOCAL MASTER. OCTOBER 22ND, 1909.

CHAMBERS.

J. I. CASE CO. v. PRESTON.

Mortgage—Foreclosure—Change to Sale before Final Order —Previous Contested Application—Res Judicata—Practice—New Account—Costs.

In a mortgage proceeding the plaintiffs moved on the return of a summons to change an order nisi for foreclosure into one for sale of the mortgaged lands.

Matheson, for the plaintiffs.

E. J. Brooksmith, for the defendants Preston and Stainder.

RIMMER, LOCAL MASTER: — The plaintiffs on 15th March, 1909, obtained an order for reference and foreclosure nisi. The certificate of the local registrar shews that on that day there was $1,147.32 due under the mortgage. The abstract shews a prior mortgage of $1,000. There is no doubt that the order for foreclosure was made on a contested application, in which the defendants represented asked for sale. The plaintiffs now apply by summons for variation of the order to an order for sale, on the ground that their solicitor had misunderstood their instructions when they pressed for foreclosure, and the application is not opposed. The question, however, arises whether I should refuse to act, on the ground that the matter is res judicata on a contested application, and the order made not appealed from. In Jackson

v. Canadian Pacific R. W. Co., 7 W. L. R. 829, the Court en banc held that a Judge had power to rescind his order made ex parte by inadvertence in a case in which he had no power to make an ex parte order, but stress is laid in the judgment on the fact that the order was made ex parte, and on the application of Rule 538. That Rule does not apply to the present case. Nor do I think that Rules 188 and 189 apply. They do not refer to orders regularly made and entered. I am not prepared to hold that a Judge can rescind his own final order, made after contest, and regularly drawn and entered. The cases do not appear to me to support such a general proposition. The order in this case is, however, not a final order for foreclosure, but an order nisi, made on originating summons for foreclosure. It may be said to be made subject to the power of the Court at any time prior to the final order to order a sale of the mortgaged property. To do so is, if the English practice applies, within my power. In Union Bank of London v. Ingram, 20 Ch. D. 464, the Court of Appeal (Jessel, M.R., Brett, L.J., and Holker, L.J.) held that there was power to direct a sale when an order for foreclosure nisi had been passed and entered. In that case there had been a reference and an order for redemption and foreclosure, and Kay, J., doubting his power to order a sale, refused, and suggested an appeal. The judgment of the Court of Appeal was followed with approval by Bacon, V.-C., in South Western District Bank v. Turner, 31 W. R. 113; and from Weston v. Davidson, W. N. 1882, p. 28, it appears that sale may be ordered any time up to the final order. It is true that the English cases are on the Conveyancing and Law of Property Act, 1881, sec. 25, sub-sec. 2, and that it may not directly apply in this province, but I consider that the provision of Order LI., r. 1, of the English Rules of Court does apply. Under that Rule the Court or a Judge may order sale "if in any cause or matter relating to real estate it shall appear necessary or expedient." By sec. 103 of the Land Titles Act (as enacted by sec. 7 of the amending Act of 1909, ch. 9), proceedings to enforce payment of moneys secured by mortgage . . . or for the sale of lands mortgaged or incumbered . . . may be had and taken in the Supreme Court of Saskatchewan under the practice and procedure of the said Court. Rule 452 of our practice is the guide as to issue of originating summons. In other respects we must fall back on the general provision of sec. 15 of the

Judicature Act, 1907: "The jurisdiction of the Supreme Court shall be exercised so far as regards the procedure and practice therein in the manner provided by this Act and the Rules of Court in force in the province at the time of the coming into force of this Act, . . . and where no special provision is contained in this Act or the said Rules, it shall be exercised, as nearly as may be, as was exercised in the Supreme Court of Judicature in England as it existed on the 1st day of January, 1898." In the absence of Rules varying the practice, I think that recourse may be safely had to the English Rules and cases on practice under them. For these reasons, I follow Union Bank of London v. Ingram and Weston v. Davidson. As the application for sale is by summons, to which the defendant Preston has appeared, I think that the cases of Excelsior Life Co. v. Prestniak, 8 W. L. R. 781, and South Western District Bank v. Turner, 31 W. R. 113, are met. All parties are desirous of and this measure of convenience is in favour of a sale.

The plaintiffs ask by their summons that $72.60 paid to the first mortgagees to protect the security, be added to the amount due under the mortgage. Following Lamont, J., in Mathews v. McLean, ante, there will be a further reference to the local registrar to ascertain and report the amount due under the mortgage, allowing all moneys properly paid to protect the security. Afterwards the order for sale, subject to the first mortgage. The plaintiffs will bear the costs of all parties of this application and the reference. All proceedings under the order of 15th March, 1909, are to be stayed until further order.

SASKATCHEWAN.

NEWLANDS, J. OCTOBER 22ND, 1909.

CHAMBERS.

WRAY v. CANADIAN NORTHERN R. W. CO.

Security for Costs — Order for — Refusal to Stay Proceedings—Discretion — Appeal — Order Appealed from not Drawn up—Practice.

Appeal by the defendants from an order of the local Master at Battleford refusing to stay proceedings in making an order for security for costs.

T. S. McMorran, Regina, for defendants.

H. V. Bigelow, Regina, for plaintiff, objected that an appeal did not lie because the order of the local Master had not been drawn up.

NEWLANDS, J.:—It is objected that, the order not having been drawn up, an appeal will not lie from it. As we have no Rule or any recognised practice on this subject under sec. 15 of the Judicature Ordinance, I have to follow the English practice. That practice, as stated in the 1909 Yearly Practice, p. 742, and Annual Practice, p. 795, is that it is unnecessary for the purposes of appealing to draw up an order.

The ground of the appeal is that the local Master did not stay proceedings in the action until the security was given.

It is usual in making orders for security for costs to stay proceedings, but that is a matter of discretion: Yearly Practice, 1909, p. 1001.

The reasons given by the local Master for not staying proceedings are reasonable ones, and I cannot, therefore, interfere with the discretion he has exercised. The appeal will be dismissed with costs.

SASKATCHEWAN.

WETMORE, C.J. OCTOBER 22ND, 1909.

TRIAL.

HUDSON v. FLETCHER.

Execution — Action against Sheriff for Trespass — Illegal Breaking of Outer Door of Dwelling-house—Damages—Claim to Goods Seized — Assignment by Company — Powers of Company—Resolution — Transfer of Land — Unfulfilled Conditions — Interpleader — Protection of Sheriff—Costs.

Action for damages for trespass, in the circumstances stated in the judgment.

H. V. Bigelow, Regina, for plaintiff.

Colin Campbell, K.C., A.-G. for Man., and G. E. Taylor, Moose Jaw, for defendants.

WETMORE, C.J.:—The Mortlach Mercantile Company Limited was a company carrying on a general mercantile business at Mortlach.

This company was composed of William J. White, Alexander B. Hudson, and William T. Hudson, and these persons, on 11th January, 1907, transferred their goods and chattels, which were situated in a store hereinafter mentioned in this judgment, to Henry C. Clements, in trust, practically, for the Hudsons Limited, upon that company being properly incorporated, and the Hudsons Limited agreeing to carry out the terms of the assignment, which were to assume and pay all debts and liabilities of the Mortlach Mercantile Company for the approximate amounts as set out in the schedule annexed to such assignment. Belcher became party to this assignment for the purpose of assenting to it.

I will just state here that the gross amount of those debts was $16,684.53.

The Hudsons Limited having become incorporated, Clements, on 2nd February, 1907, assigned the property to them, they agreeing to assume and pay all the debts and liabilities of the Mortlach Mercantile Company above referred to.

Hudsons Limited entered into possession of this property and also the store in which it was situated.

Belcher, who is the plaintiff in the action of Belcher v. Hudsons Limited, post, was the trustee for the creditors to whom the Mortlach Mercantile Company was indebted.

The plaintiff Hudson was the president of Hudsons Limited.

By memorandum of agreement dated 2nd February, between Hudsons Limited and Belcher, the company agreed to pay the indebtedness to the Mortlach Mercantile Company, as follows: $500 on 15th February, 1907; $500 on 15th March, 1907; $1,000 each month thereafter until the whole amount was paid.

The Hudsons Limited made these payments for a time satisfactorily, but eventually they fell behind, and, as a result, Belcher brought an action against the company to recover the amounts for which he was so trustee, and on 21st April, 1908, recovered judgment, upon admissions in the defendants' pleadings, for $1,010, being a portion of his claim. Execution was issued upon this judgment, and the stock-in-trade of Hudsons Limited seized, situated in this

store, but the execution was satisfied by money advanced by Cameron & Heap upon a mortgage on the property and the joint note of Hudsons Limited, and the property was released from seizure. Belcher, however, went on and recovered judgment at the Moose Jaw sittings for the balance of his claim, being $3,387.22 and costs, and, by leave of the Judge, immediate execution was ordered for the amount of such judgment. Execution was issued accordingly against both lands and goods for the $3,387.22 on 28th May, and lodged forthwith in the hands of the sheriff, the defendant Fletcher.

The plaintiff Hudson set up that before this execution was lodged with the sheriff he had entered into an agreement (dated 5th May, 1908), with Hudsons Limited, whereby that company agreed to sell to him lots 1 and 2 in block No. 17 in the townsite of Mortlach, being the lots on which the store is situated and also lots 21 and 22 in the same block; that he obtained a transfer from the company of this land on 13th May, 1908; and that a certificate of title thereto issued to him on 15th May. He also claimed to have obtained from Hudsons Limited an assignment of the stock and merchandise and book accounts and general assets of that company also dated 5th May.

In order to appreciate the character of the agreement, assignment, and transfer, I have got to state what took place between J. W Hudson and Hudsons Limited with the object of obtaining the same.

The negotiations, if I may so call them, that took place between J. W. Hudson and Hudsons Limited, took place on 4th May, 1908. Hudsons Limited was composed of the following shareholders: J. W. Hudson (who was president), W. T. Hudson (who was secretary), A. C. Baker (vice-president, Nellie E. Baker (his wife), Lottie Hudson (wife of W. T. Hudson), Theoline Hudson (wife of A. B. Hudson), and C. L. Metcalf (wife of W. H. Metcalf).

No written notice was given calling a meeting of shareholders for the purpose of passing on the proposed transfer and assignments.

J. W. Hudson, W. T. Hudson, and A. C. Baker were engaged in the store on 4th May; A. B. Hudson was also there, and W. H. Metcalf (who happened to be in town) was called in; and the resolution which I am about to set out was passed. Neither Nellie E. Baker nor Lottie Hudson

nor Mrs. Metcalf was present, and they had not received any notice of the proposed meeting or of its object. A. B. Hudson professed to act for Theoline, his wife, under a general proxy, and A. E. Baker for his wife, under a similar proxy, Metcalf for his wife, and W. T. Hudson for his wife. A messenger was, 2 or 3 days afterwards, sent with a copy of the resolution to Mrs. Baker, who signed it. These ladies were never present at any meeting of shareholders at which any such resolution was passed, nor did they have any notice of such meeting, as I have before stated.

I will not stop here to discuss whether, under such circumstances, the resolution was valid or not, because, from the view I take of the case, it is not necessary to do so.

The resolution passed was as follows: "Mortlach, May 4th, 1908. A meeting of the shareholders of Hudsons Limited was held in registered office of this company this day. Moved by Theoline Hudson, seconded by C. L. Metcalf, that the offer of John W. Hudson to purchase the assets of Hudsons Limited for $8,000, repayable $100 per month, with interest at 6 per cent. per annum, payable yearly, with the privilege of paying additional amounts from time to time, be and is hereby accepted, and that an agreement for sale of the real property of Hudsons Limited be executed in favour of John W. Hudson for $2,000, repayable $40 per month, with interest at 6 per cent. per annum, and that a bill of sale for the stock-in-trade, business, etc., of the said Hudsons Limited, be executed in favour of the said John W. Hudson for $6,000, repayable "$60 per month, with interest at 6 per cent. per annum, payable yearly, upon the said John W. Hudson executing in favour of Hudsons Limited certain notes for $6,000, repayable $60 per month, with interest at 6 per cent., payable yearly, and that upon execution of the said papers possession will be delivered to the said John W. Hudson."

Acting in alleged pursuance of that resolution, the alleged contract for sale of the lands hereinbefore mentioned was entered into between Hudsons Limited and J. W. Hudson, the expressed consideration being the sum of $2,000, payable in monthly instalments of $40 each, as provided in the resolution, the first of such instalments to come due on 1st July, 1908, with interest at 6 per cent., and the balance was to be paid on 1st May in each and every year, and it went on to provide that, on payment of such sums of money

with interest as aforesaid, the vendor, that is the company, promised and agreed with the purchaser to convey and assure, or cause to be conveyed or assured to him, the said parcels of land, by deed or transfer.

Assuming that agreement to be a valid agreement, the condition upon which the transfer was to be made was never fulfilled, because the payments were not made, and therefore there was no authority whatever for the transfer from Hudsons Limited to J. W. Hudson.

It will be observed that the resolution of 4th May authorising a sale of the stock-in-trade, business, etc., to be executed in favour of J. W. Hudson, provided that it should be executed upon Hudson executing in favour of the company certain notes for $6,000, which notes were repayable (such was the expression used) at $60 per month, for the $6,000 for which the stock-in-trade, etc., was to be sold. J. W. Hudson never executed these notes. I doubt whether, at the time the sheriff made the seizure hereinafter stated, he had even executed one of them. He did sign 4 notes for the amount of $240 in the whole, but that is all. It has not been made to appear to my satisfaction when these notes were signed. The alleged assignment or agreement to assign of 5th May in J. W. Hudson's favour (put in evidence), was therefore utterly unwarranted by the resolution, and, that being so, I hold, in so far as the goods and other property embraced in that assignment are concerned, that they did not pass, and the right of property therein still remained in the Hudsons Limited.

Upon the execution on the last mentioned judgment, which I have hereinbefore mentioned, being delivered to the sheriff on 28th May, he sent them with a warrant to his bailiff, the defendant Grant.

The goods were in the store on lots 1 and 2 before referred to.

The plaintiff Hudson lived above this store. It was his dwelling. He had practically, I think, lived there before the alleged assignments to him, that is, he sometimes stayed there and sometimes at his farm. However, be that as it may, on 29th May, when the bailiff entered the premises, he was living over the store. The building was all under one roof. There were 3 entrances to the store, 2 in front and one in the rear. All these entrances were fastened. The bailiff went upstairs and interviewed Hudson and told him

he had the executions, and requested him to open the store, and he refused to do so. The bailiff then forced open one of the outer doors of the store with a pry. It was fastened with some sort of a catch over the door, but he forced this open and entered. I hold that to be a breaking open of the store.

It is contended, in the first place, against the defendants Fletcher and Grant, that this entry was unlawful; that the dwelling house being over the store rendered the breaking of this outer door a breaking of the outer door of the dwelling house.

There was no communication in any way between the apartments upstairs, which Hudson occupied as a dwelling-house, and the store. This upstairs portion was reached by stairs which were outside the building altogether, through a door on the upstairs flat. The question therefore arises, was this a breaking of the outer door of the dwelling-house? Because, if it was, the sheriff and his bailiff were guilty of an unlawful entry, and would be responsible in damages.

Were I to decide this question upon by own unaided judgment, I think I should have little difficulty in reaching the conclusion that the sheriff's bailiff was justified in entering this building in the way he did. In Lee v. Gansel, 1 Cowp., Lord Mansfield, C.J., in delivering the judgment of the Court, states at p. 6 the reason for the law that the outer door of a man's dwelling-house may not be broken open to execute process. He says: "This has been long and well understood. The ground of it is this: that otherwise the consequences would be fatal, for it would leave the family within naked and exposed to thieves and robbers." It seems to me that in a building situated as the one in question, the family, living upstairs, would be no more exposed to thieves and robbers by one of the doors of the store being forced open than they were before such breaking, because the thieves and robbers could not get into the dwelling part of the building from the store. I am satisfied that, as the law now stands, by virtue of recent enactments both here and in England, the breaking and entry of a store situated as this one, would not constitute burglary. But, assuming that I can not be aided in this matter by the consideration whether this store was a dwelling-house so as to make it the subject of a burglary under the statutes, I must be governed by the common law and not the statute law. Hodder

v. Williams, [1895] 2 Q. B. 663, is the latest case I can find dealing with the question of what building may be broken into through the outer door to execute process. In that case the sheriff's bailiff broke open the outer door of a building occupied as a workship and for storage of goods, no one living in it, and it not being connected with the dwelling-house; the Court held that the breaking was justifiable. The authorities bearing on the question, from Semayne's Case, 5 Rep. 91a, 1 Sm. L. C., 9th ed., p. 99, down, were discussed, and, while the Court held, as I have stated, that the breaking of the outer door of that building was justifiable, the several Judges very clearly laid down that they so held because the rule did not include buildings not connected with the dwelling-house. Lord Esher, M.R., at p. 666, says: "It seems clear that 'house' in that maxim means 'dwelling-house,' and does not include other buildings, such as barns or outhouses not connected with a dwelling-house." And Lopes, L.J., at p. 667, says: "It has frequently been stated as the law that this privilege only extends to the dwelling-house and not to a barn or other building not connected with or within the curtilage of the dwelling-house. . . . The doctrine relied upon has never been supposed to apply to anything but a dwelling-house, and has never operated to prevent a sheriff from breaking open the door of any building not being a dwelling-house or connected with a dwelling-house." And Kay, L.J., at p. 667, says: "A barn or outhouse not connected with the dwelling-house may be broken open in order to levy execution." It will be observed that all the Judges lay it down, it seems to me by clear implication, that, in order to justify the breaking of an outer door, the building must not be connected with the dwelling-house or within its curtilage. I am therefore reluctantly forced to the conclusion that the breaking open of the door of this store was unlawful.

Regina v. Higgs, 2 C. & K. 322, was the strongest case brought under my notice for the plaintiff. In that case the prisoner was indicted for burglary. He broke into a dairy of the prosecutor. This dairy adjoined a kiln, one of the walls of which supported one end of the dairy, and the kiln adjoined the dwelling-house, one end of it being supported by one of the walls of such dwelling-house. There was no internal communication from the dwelling-house to the dairy. To get from the dwelling-house to the dairy,

a person had to go from the dwelling-house by a door into the yard and from the yard by another door into the dairy. It was held that the dairy was not a part of the dwelling-house, but it will be observed that in that case neither the kiln nor the dairy was under the same roof as the dwelling-house, and that the roofs of the kiln and the dairy were lower than that of the dwelling-house.

The next question that arises is as to the effect of the unlawful entry upon the seizure made under the execution. It is urged that the seizure is void, and that the plaintiff is entitled by way of damages to the value of the whole property seized (excepting of course the portion of it returned to the plaintiff as hereinafter stated). It is quite possible and very probable that, if an application had been made to the summary jurisdiction of the Court, the seizure would have been set aside. No such application, however, was made. I have come to the conclusion that, under the circumstances of this case, it is not necessary for me to decide this question in its general aspect. It is one upon which when so considered the authorities do not appear to be decided. I have above held that the stock-in-trade and other personal property of Hudsons Limited alleged to have been assigned to J. W. Hudson did not pass to him; it remained the property of Hudsons Limited. The bulk of the property seized by the sheriff consisted of property which I so hold to be that of Hudsons Limited, and was liable to seizure under the execution. It would, in my opinion, be manifestly unjust to hold that J. W. Hudson, who does not own the property seized, is entitled to damages to the value of it, or to hold that, quoad the Hudsons Limited, who have not complained, the seizure is invalid.

There was some property seized which J. W. Hudson asserted was purchased on his own credit after the alleged assignment of the business to him. I am inclined to think that such is the case, but, if so, it was comparatively trifling in amount. I have not scrutinised the evidence in this respect very carefully, for the reason which I am now about to state. I hold that J. W. Hudson is precluded not only as regards that property but also as regards the whole property seized and sold by the sheriff.

At the time that the bailiff seized this property, he promptly notified the plaintiff of the seizure and what he had seized, and the plaintiff then claimed it as belonging to

him and not to the execution debtors, Hudsons Limited. This was stated verbally to Grant, the bailiff. Subsequently, however, Hudson appeared before the sheriff and he put in a claim, in writing, to certain portions of this property, specifying them. The sheriff, acting under Rule 432 of the Judicature Ordinance, as enacted by sec. 3 of ch. 8 of the Ordinance of 1903, gave notice of this claim to the execution creditor, and he abandoned any right to the property mentioned in such written claim of the plaintiff, and the property was restored to him. The claim was prepared in the following manner: the plaintiff appeared at the sheriff's office with a list in writing of what he alleged was not liable to seizure. It was very badly written, so much so that it was suggested that he, the plaintiff, should read the articles from this list, and the sheriff should write them down on another piece of paper. This was done. But the plaintiff alleges that he did not claim in this writing more than he did, because the sheriff would not take down what he desired him to take down; that he said, when he, the plaintiff, mentioned one article for instance, "Well, if I take down that, I might as well give you the whole thing," and he did not take it down. I do not believe the plaintiff in this respect. The sheriff utterly denies that he ever said anything of the sort. On the contrary, he stated that he took down everything the plaintiff mentioned except part of a bag of flour, which he told him he could have anyway, and he would have been very glad if the plaintiff had put in a claim to everything, and I can quite understand why the sheriff would be. It would relieve him of all responsibility in the matter, and it would be quite unnatural, in my judgment, for the sheriff to decline to take down anything which the plaintiff had claimed. Moreover, the plaintiff signed the claim as written by the sheriff. I accept the sheriff's statement of this transaction.

Having reached this conclusion, I am of opinion that the plaintiff has no cause of action with respect to any of the property. I do not hold that a party claiming property seized by the sheriff is bound to interplead, and that, if he does not, he loses his remedy. It is not necessary for me, for the purposes of this case, to go that far, but I have no hesitation in holding that when a party so claiming puts in a claim to a portion of the property, and that is dealt with by interpleader proceedings, as in this case,

it does not lie in his power to bring an action for other property which was under seizure at the time by virtue of the same writ to his knowledge, and which was not included in the notice of claim. Interpleader proceedings are provided for the protection of the sheriff, and it gives a person who states that his property has been wrongfully seized by the sheriff, under execution against another person, a right to put in a claim, and then the law provides the means by which that claim can be adjudicated upon and settled. Having selected his remedy, the claimant must stand by it; he cannot make use of it in so far as a part of the property is concerned and insist upon his common law right of action as to another portion of the property. To hold otherwise, in my judgment, would be to lead the sheriff into a trap and cause him to go forward with his execution in confidence, merely to find out that the claimant had lulled him to sleep by claiming a portion of the property. For this reason, also, I am of opinion that, so far as the property seized by the sheriff and not claimed by the plaintiff in writing is concerned, the plaintiff has no right of action. It is important to bear in mind that Rule 432 of the Judicature Ordinance requires the claim to be in writing, and the sheriff cannot interplead unless it is. The plaintiff, therefore, having put in a written claim in accordance with the Rule, the sheriff had a right to assume that he had abandoned the verbal claim stated to the bailiff. The sheriff could only apply for interpleader in respect to the property mentioned in the written claim.

It was also set up in the course of the trial that the sheriff remained in possession an unreasonable length of time, and that he sold the property at an unreasonable and unfair price. I find against the plaintiff in so far as both questions are concerned.

I am of opinion that the damages by reason of the wrongful entry should not in this case be very heavy; in fact I think that they should be not much more than nominal. Technically, under the law, the outer door of the dwelling-house was broken open. In good practical common sense the outer door of the dwelling-house was not broken open at all. The plaintiff's occupation of the dwelling portion of the building was not interfered with in the slightest degree. I will therefore only award $20 as damages.

There will, therefore, be judgment for the plaintiff upon the issues joined arising out of the first and second counts in the statement of claim for $20 and costs. There will be judgment for the defendant upon the issues arising out of the third and fourth counts of the statement of claim with costs.

The plaintiff to have the general costs of the action, but no costs with respect to the proceedings relating to the issues found for the defendants. The costs so taxed to the plaintiff shall be taxed as if the action had been brought in a District Court. In so far as witness fees are concerned, the attendance and travel of the plaintiff only will be allowed to the plaintiff, and only 3 days will be allowed him for coming, attendance, and returning. The breaking of the door of the shop was practically conceded, and all the rest of the testimony, in so far as this case was concerned, was directed towards the right of property in the goods so seized under the execution, and that has been proved in favour of the defendants. One judgment will be set off against the other, and the party in whose favour the balance may be will have execution therefor.

SASKATCHEWAN.

WETMORE, C.J. OCTOBER 22ND, 1909.

TRIAL.

BELCHER v. HUDSONS LIMITED.

Bankruptcy and Insolvency—Assignments Act—Company—Transfer of Land and Assignment of Personal Property by Insolvent Company—Knowledge of Transferee—Intent to Prejudice and Delay Creditors.

Action by an execution creditor of the defendants Hudsons Limited, an incorporated company, to set aside transfers of land and assignments of personal property by the company to the defendant J. W. Hudson. See the previous case, Hudson v. Fletcher.

Colin Campbell, K.C., A.-G. for Man., and G. E. Taylor, Moose Jaw, for plaintiff.

H. V. Bigelow, Regina, for defendants.

WETMORE, C.J.:—As stated in Hudson v. Fletcher, ante, the assignment of the personal property to J. W. Hudson was unwarranted, and therefore he has no interest in the property so alleged to have been assigned. Of course, this is immaterial now as regards the movable property, because the sheriff has swept the whole of it away. If any of the personal assets of Hudsons Limited, such as book debts, promissory notes, and the like, were not seized by the sheriff, this judgment will apply thereto, as the property therein did not pass to J. W. Hudson. I must hold the sale and transfer of the real estate also invalid, and that the same, as well as the assignment of the personal estate and assets of Hudsons Limited, were made with the intent of delaying and hindering creditors of the company.

At the time the alleged agreement for the sale of the lots of land and transfer thereof and the sale of the personal property respectively were made, the Hudsons Limited were insolvent or on the eve of insolvency, and the management knew it. I find that the shareholders of the company who were present on 4th May, when the alleged agreement of sale was said to have been authorised, including J. W. Hudson, were aware that Belcher was pressing for the balance of his claim. J. W. Hudson testified that he was not aware of it. I cannot believe him. Notice of motion for 28th April to set the case down for trial was served on the company's solicitor on 23rd April. The order setting down was made on 4th May—the very day on which the shareholders met. It is very difficult for me to believe that the solicitors did not keep their client advised as to such an important step in the cause, and Baker, one of the shareholders, testified that he and J. W. Hudson were aware at the time of this meeting that Belcher was proceeding with his suit.

There were a number of other creditors, but there is not any evidence to shew that any of them had taken any proceedings to enforce their claims at the time of this meeting, but they subsequently did take such proceedings, with the result that, after the Belcher executions were lodged, executions at the suit of other creditors were lodged, amounting

to $1,614.53, and I think, under the circumstances of this case, it is fair to assume that the debts on which the judgment supporting their executions were based were outstanding at the time when the assignments and sales of 4th and 5th May were said to have been authorised and made.

Then there was the mortgage to Cameron & Heap of $1,010 outstanding. The mortgage to Cameron & Heap was made on 1st May, 1908. The loan made on the security of this mortgage and the note of Hudsons Limited was obtained through Mr. Burton, the manager of Cameron & Heap. He was under the impression that the judgment for $1,010 obtained by Belcher represented the whole of his claim, and that he had no further claim, and, assuming that, he advised J. W. Hudson, if possible, to change the business on account of the reputation that Hudsons Limited had—that they would have a hard time in getting credit anywhere. And Mr. Burton went on to state that this company had a poor reputation through trouble with their creditors and also as managers, as business people, and I accept this testimony as correct. Now, if to this situation, as Mr. Burton understood it, we add $3,387 of liability (Belcher's judgment) which he did not understand to be outstanding, the difficulty for the company to get credit would be very considerably increased. The management and shareholders who met on 4th May were aware of all this. After the seizure by the sheriff the value of the stock in the store was appraised by one Strathearn. I see no reason why his appraisement should not be accepted, and he valued it at $4,560.71. After some goods, amounting in value to about $160, were deducted from this, in consequence of representations made by the defendant Hudson, the rest of the stock was sold at 35 cents in the dollar and the fixtures at $120. The fixtures were sold subject to some liens which attached against them. The stock was not sold subject to Cameron & Heap's mortgage, and the amount of that mortgage was paid out of the proceeds of the sale. I have no reason to hold that that sale was not a fair one, and the evidence establishes that it realised as much as would be realised from a sale made under the circumstances.

In Davidson v. Douglas, 15 Gr. 347, Spragge, V.-C., at p. 351, lays down the following: "In considering the question of the solvency or insolvency of a debtor, I do not think

that we can properly look upon his position from a more favourable point of view than this, to see and examine whether all his property, real and personal, be sufficient, if presently realised, for the payment of his debts, and in this view we must estimate his land as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it will bring in the market at a forced sale, or at a sale when the seller cannot await his opportunities but must sell." And at p. 355 he says: "There is no doubt as to the meaning of the words 'in insolvent circumstances.' That it is not necessary that the debtor should be either technically a declared insolvent or openly and notoriously insolvent." This is quoted with approval by Boyd, C., in Warnock & Co. v. Kloepfer, 14 O. R. at p. 291. The decision of the Chancellor was upheld by the Court of Appeal in Warnock & Co. v. Kloepfer, 14 A. R. 324, and the learned Judges who constituted the majority of that Court, who dismissed the appeal in express terms, agreed with the view that the Chancellor took of the meaning of the expression "insolvent circumstances." This case went on appeal to the Supreme Court of Canada (18 S. C. R. 701), and the appeal was dismissed. I must admit, however, that the report last mentioned is not very satisfactory as to what constitutes knowledge of insolvency, I refer to National Bank of Australia v. Morris, [1892] A. C. 287, where, at p. 290, Lord Hobhouse lays it down: "If the creditor who receives payment has knowledge of circumstances from which ordinary men of business would conclude that the debtor is unable to meet his liabilities, he knows within the meaning of the Act that the debtor is insolvent." It is obvious that what is so stated in respect to a creditor is equally true with respect to any other person to whom it is necessary to bring home knowledge of insolvency. In view of what was so laid down by Spragge, V.-C., and Lord Hobhouse, and taking into consideration all the circumstances that I have mentioned, coupled with the further facts that Hudsons Limited were unable to meet the payments to the plaintiff as they fell due, that in April the sheriff had taken possession of the goods in the store under the execution for $1,010, that Hudsons Limited had in consequence to shut down for a time, and that J. W. Hudson had before 4th May given Mr. Burton a statement shewing other liabilities against Hudsons Limited than to the plain-

tiffs, that they were large, and that J. W. Hudson had stated to him that these other creditors would jump in, and to prevent any further law costs and judgments the proposed sales and assignments were to be made, I am forced to the conclusion that Hudsons Limited were at the time of the execution of the contracts of sale and assignments in question both of the land and personal property, and of the transfer of the land, in insolvent circumstances, and the management, including J. W. Hudson knew it, and at any rate Hudsons Limited were at the time in question on the eve of insolvency, and the management and J. W. Hudson knew it. It is also worthy of comment that the minute book of the company never turned up. J. W. Hudson states that it was kept in the safe, but when the sheriff broke into the safe (as he had to) that book was not there. I also find that such contracts of sale, assignment, and transfer, were made with intent to prejudice, hinder, and delay creditors, especially the plaintiff. This conclusion is irresistible when I consider the testimony given by Burton above referred to, and the fact that Hudsons Limited had given an agreement by which they had bound themselves to pay Belcher $1,000 a month, and that by the proposed assignments and transfers it was intended that the whole of the property of that company should be transferred to J. W. Hudson so that the creditors would not have a single asset of the company to proceed against, and that all the creditors would have had to enable them to realise anything on their claims would be $100 a month and 6 per cent. interest, which J. W. Hudson had agreed to pay; and even that means of realisation was not very clearly expressed. I hold the contract for the sale of the land, the assignment of the stock-in-trade, the assets, and the transfer of the real estate, to be void under sec. 38 of the Assignments Act (ch. 25 of the statutes of Saskatchewan, 1906).

It may be as well to repeat here what I found in respect to the transfer of the land in Hudson v. Fletcher, ante, namely, that it was invalid because the condition upon which such transfer was to have been made was not performed.

In arriving at the conclusion I have reached, I have not lost sight of the fact that the lands were valued in the contract of sale at $2,000, but, even at that value, the assets of the company, viewed from the standpoint of the cases

I have cited, were not sufficient to pay the debts. They were not sufficient to pay the plaintiff's judgment alone.

There will, therefore, be judgment for the plaintiff with costs to be paid by the defendants. The agreement to sell the land in question and the certificate of title issued to J. W. Hudson will be set aside and the name of Hudsons Limited restored to the register in the land registration office as the registered owner of the land, and the agreement to sell the personal property will be set aside; this, however, not to interfere with the seizure and sale by the sheriff under the executions or the right of the execution creditors (if any) under the Creditors Relief Ordinance, and it will be referred to the local registrar to hold an inquiry as to the assets of the Hudsons Limited, retained or held by the defendants or either of them under the said agreements of sale and transfer or otherwise howsoever, and such defendants and each of them shall account to such local registrar at such inquiry. The plaintiff to be at liberty to move for further directions either as to costs or otherwise.

YUKON TERRITORY.

CRAIG, J. SEPTEMBER 28TH, 1909.

TRIAL.

CANADIAN BANK OF COMMERCE v. DONOGHUE.

Statement of Action — Validity — Authority of Partner of Defendant — Employment of Solicitor — Ratification — Authority of Solicitor to Settle—Power of Attorney — Evidence.

This action was brought to determine whether a certain settlement of the original action made on the 16th May, 1905, was valid and binding on the defendants.

F. J. Stacpoole, for plaintiffs.

C. W. C. Tabor, for defendant Donoghue.

J. B. Pattullo, K.C., for defendant Barrett.

CRAIG, J.:—The facts leading up to the direction of the issue are as follows. The defendant Donoghue is a trader,

and at the time of the beginning of this matter was trading into Dawson for short periods of the year. The defendant Barrett is a physician carrying on business in Dawson and residing here at all times since the beginning of these matters. On 31st August, 1901, Donoghue and Barrett entered into an agreement with one Wilson by which they purchased a certain quantity of oats, hay, and potatoes, which were to be resold by Wilson for the benefit of the defendants as well as for himself (Wilson), who, in the words of the agreement, "contributd an equal quantity of the goods." The agreement is a rather nondescript one, but, on a perusal of all of its terms, it means nothing more or less than a copartnership in the sale of the goods. The goods were warehoused under the direction and control of the Canadian Bank of Commerce, from whom Donoghue and Barrett borrowed money, and from whom Wilson was also a borrower. The bank were to issue orders and releases to enable Wilson to dispose of the goods. These goods were all sold by Wilson. Donoghue and Barrett never realised anything out of the sale, and upon an action brought by the bank upon a promissory note given for funds to carry on these transactions a defence was raised by Donoghue and Barrett that by a specific agreement made with the bank the bank were to take care that all the proceeds of sales made of these goods were to be deposited in a special account and applied in reduction of the advances made to Donoghue and Barrett to carry on this deal, but that, in fraud of the said agreement, the bank applied the proceeds of the sales to the personal liability of Wilson to themselves, and really appropriated the funds which belonged to Donoghue and Barrett arising out of the sale of these goods to a liquidation of another debt, entirely contrary to the actual terms of the agreement.

This suit was instituted in March of 1904. In the year 1901 the original agreement of partnership was made; Donoghue was in the country and took part in the negotiations with the bank; he left shortly after, remaining out until the following summer (1902), when he was in the country in June and July, remaining for a few weeks. Before leaving he gave to Barrett a power of attorney, general in its terms, authorising him "to manage, lease, and sell all his property real and personal in the Yukon Territory, and generally to deal with his real and personal estate as effectually as he himself could; to commence, carry on, and de-

fend all actions, suits, and proceedings touching his real and personal property; and to receive and give discharges for all moneys, securities for money, debts, chattels" (etc.), and "to indorse and execute and sign his name to all cheques, promissory notes, bills of exchange, contracts, warehouse receipts, and assignments." Dr. Barrett swears that this power of attorney was given in view of and for the purpose of carrying out the transactions covered by the agreement first mentioned during Donoghue's absence. Barrett signed several cheques and notes for the purpose of carrying on the transaction and obtaining money from the bank. All these cheques were signed by Barrett. Wilson did some depositing to the credit of Donoghue and Barrett, but all other banking was done by Barrett.

On 16th May, 1905, a settlement was made bv Dr. Barrett, acting on behalf of himself and his partner, Donoghue, as follows: "Received from Dr. W. T. Barrett a cheque for $4,500 and promissory note at 60 days, signed by T. J. Donoghue and indorsed by Dr. W. T. Barrett, in favour of the Canadian Bank of Commerce, in pursuance of settlement made between the plaintiffs and the defendants to the above action, whereby $9,000 was to be paid by the defendants in full settlement of the above suit, and which cheque and promissory note is received by the plaintiffs in full setlement of the above action, the plaintiffs retaining the book debts assigned to them, all moneys collected thereon to be the property of the bank." This settlement is signed by D. C. Cameron, manager of the bank, and by Clark, Wilson, & Stacpoole, the bank's solicitors, initialled by Dr. Barrett. Pursuant to this settlement, Barrett paid in cash the amount mentioned and gave a note signed by Donoghue, Barrett acting as his attorney, and indorsed by Barrett. Barrett has always stood by the settlement, and to-day he stands by it, and is only standing by watching in this issue.

Donoghue alleges, first, that he cancelled the power of attorney; that he was never a real partner of Barrett, and therefore Barrett had no authority as a partner to settle in his behalf; that the agreement was not a partnership agreement, but simply a speculative venture not in the nature of a partnership; that he took no part in retaining the solicitors, Pattullo & Ridley, to defend the action, and

that therefore he was not bound by their action as solicitors in settling.

First, as to the cancelling of the power of attorney. Donoghue swears that in April he wrote to Barrett cancelling his power of attorney. Barrett swears that such a letter was never received by him. Donoghue also says that he did at the same time notify the bank that the power of attorney was cancelled. Mr. Sanson, on behalf of the bank, says that they have a very perfect system of recording letters; that every letter received is entered and has to be opened by the manager or accountant and put on record; that all letters are kept for 20 years; that no such letter appears on their records, and they have made search in their correspondence files, and no such letter can be found; that the power of attorney appears on their securities register as still in good standing. Dr. Barrett also swears that he received no such letter. Mr. Pattullo, one of the firm of solicitors acting for the defendants, also swears that his firm did not receive a letter which Donoghue says he wrote from Montreal on 23rd June, 1905, expressing surprise at the settlement and repudiating the same. Regarding these letters it is contended by the plaintiffs that they are now created for the purpose of this issue and are not true copies of letters really sent. The peculiarity about them is that the one produced as a copy is an original, although other copies are produced. The original produced has on the bottom a postscript "I sent bank notification of cancellation of power of attorney in April, 1902." Donoghue's own evidence regarding this correspondence is not very satisfactory to me, and I find as a fact that these letters were not received; whether they were dispatched or not is an open question. I will consider the question of law later as to the effect of the power of attorney. Then as to the retaining of the solicitors, I find that Pattullo & Ridley were retained by Barrett beyond any doubt; that they advised the settlement as being a good one, under all the circumstances, is also true; that Donoghue was perfectly aware that they were the solicitors acting in his behalf in this action is also clearly proven, because correspondence is had with Donoghue in which he speaks of the action and his attending upon the trial, referring to the fact that he had been communicated with before by his partner, Dr. Barrett, as to the trial, and

speaking of consultations which he had with counsel, and that he was present in Ottawa with Mr. Ridley, the partner of Pattullo, when they consulted Mr. Aylesworth regarding this suit; and it is impossible now for him to repudiate his solicitors when he was fully aware that up to the time of the settlement they were acting for him and his partner Barrett. Again, Barrett, after the date when Donoghue says he wrote cancelling the power of attorney, acted under the power in signing cheques upon Donoghue's private account in relation to certain other matters in connection with which he had authority to act for him, namely, the renewal of certain mining claims and the paying of expenses in working a tunnel. Then Donoghue was in Dawson in June and July of 1902 following the time when he says he wrote letters cancelling the power of attorney; was in the bank; saw Barrett, and made no mention at all of the fact that he had cancelled the power of attorney. The cheques which Barrett gave regarding the mining work were given in July and August, 1902. Donoghue raised no question about these cheques, and as late as April, 1903, Donoghue had correspondence with the assistant manager of the Canadian Bank of Commerce regarding his own private account, and must then have been aware of the cheques which Barrett drew against it. Upon all the evidence, I am of opinion that Donoghue did not write the letters which he says he wrote cancelling the power of attorney, and in any case these letters were not received by the proper persons. Donoghue was examined by commission in Montreal on his own behalf, and his evidence is not satisfactory to me. He hedges a great deal and endeavours very often to evade answering questions which he could very easily have answered one way or the other. Being asked, at p. 20 of the commission: "Q. When you went back to Dawson in the summer of 1902, whom did you see as representing the bank? A. Mr. Cameron. Q. Did you say anything to Mr. Cameron about having cancelled Dr. Barrett's power of attorney? A. Not that I am aware of. Q. You got no acknowledgment from the bank of the letter, the copy of which you have produced as exhibit C? A. No, not that I am aware of. Q. You keep a letter book? A. No. Q. Where did you get the carbon copy of that letter exhibit C?" (Exhibit C. is the letter said to have been written cancelling the power of attorney). "A. Well, I had this taken since this case commenced; I have had several

of these copies taken. Q. Taken from what? A. From the carbon copy that I had; I could not say whether this is a carbon copy or not; I have got a dozen. Q. Now, Mr. Donoghue, can you tell me where the original carbon copy is of the letter exhibit C? A. I could not say if the original is on file there or not; I could not tell the original from one of the other; I could not tell if this is a copy of not. Q. Where did you get the carbon copy of the letter which is produced as B? A. That is taken from the original carbon. Q. Where is the original carbon? A. I think I can furnish it; I can furnish both, I think; if you want them I can furnish both; I can get you the original carbon; my papers are not in very good order." In his evidence regarding the retaining of the solicitors he said he presumed that the solicitor "was acting for both of us." "Q. And you knew that they had been employed to act in the defence in that case? A. I knew it. Q. And you acquiesced in the employment which Dr. Barrett had so made of them to defend your interests? A. I was never consulted further than that he was acting, and that we were taking a counterclaim against the bank for a larger amount of money, and that on no consideration was that settlement to be made otherwise. Q. Who was doing all this for you? A. Pattullo & Ridley. Q. Then you knew and acquiesced in their acting as your attorneys? A. Up to a certain point. Q. There is no doubt that they were representing you? A. That is admitted all through." In regard to instructing Pattullo & Tobin, the successors of Pattullo & Ridley, after the issue was directed, Mr. Donoghue is not very clear in his evidence. Being asked if he did not instruct them by wire, he said "possibly;" that he could not recollect, after having previously said that he did not instruct them at all; and then he endeavours to escape from that position by saying it was a different firm.

On the whole, I think the bank have proven all the facts which they set out to prove, namely: that Barrett and Donoghue were parties in the transaction; that Barrett had authority to act for Donoghue in his absence in negotiating the promissory notes and cheques which he did, in the interests of the deal and in the interests of himself and his co-partner; that the power of attorney was signed for the express purpose of carrying on this transaction; necessarily it must have been so, as Donoghue was not in the country and the only partner present who could act was Barrett; that Dono-

ghue did not cancel the power of attorney; and that he was fully aware and acquiesced in the retainer of Pattullo & Ridley in the action. That the settlement was a beneficial one, in the opinion of the solicitors, I am also convinced. They were careful in the consideration of the case; fully advised their clients as to the difficulties in the way of success, instructing them that if they could establish the facts which they alleged, then that success would attend the prosecution of the counterclaim; and finally advising them that, considering all the circumstances, the settlement was a good one, and, in their opinion, better than could have been arrived at after a trial of the issues. I think also that Dr. Barrett acted judiciously and wisely in the interests of the firm and in good faith. He is now standing by the settlement if he had the power to make it. I will consider the law as applied to these facts.

The plaintiffs contend, first, that Dr. Barrett as a partner had power to settle this action as he did and to compromise the counterclaim which the defendants raised in the original action against the bank, as I have already recited. On this branch of the case I agree with the contention of the plaintiffs. I think, beyond any doubt, Dr. Barrett had authority to settle as he did. It is impossible for the defendant Donoghue to contend that Barrett had not all the authority which he assumed to have. He himself admits that negotiations were entered into with the bank; that the defendants required the aid of the bank in the way of money; that notes had to be negotiated and renewed and discounts of those notes obtained from time to time to carry on the business; that the business was to be carried on through the bank by deposits made on sales of goods to be applied to the credit of the partnership. No one but Barrett could have carried on these transactions. Donoghue had left the country, was away when the major part of the work was done, and must have contemplated Barrett's acting exactly as he did in carrying on the business. Therefore, he was a partner with all the powers of a partner, both by virtue of his partnership agreement and by direct implication from the nature of the transaction, to Donoghue's knowledge. Being such a partner, I think he had power to compromise any action which the defendants may have had by way of counterclaim against the bank. I cite the Encyclopædia of the Laws of England under the head of "Partnership," vol.

9, p. 460; also the same work, under the head of "Release," vol. 11, p. 216, and the cases there cited; also Hankshaw v. Parkins, 2 Swans. 539; Smith's Mercantile Law, p. 56; Lindley on Partnership, Bl. ed., p. 216 et seq.; also Tomlinson v. Broadsmith, [1896] 1 Q. B. 386. This case is more particularly on the point of the authority of a partner to employ a solicitor for his co-partner. Apart altogether from the legal authority which the partner has to so engage a solicitor, I think that Donoghue confirmed the selection of a solicitor and his retainer, by correspondence referring to the action and to the defences raised, his intention to attend the trial when called upon, and his consultation with counsel assisted by Mr. Ridley, one of the firm, prior to the settlement; and there can be no fuller and more ample confirmation, if confirmation were needed, of the retainer of the solicitors in the case. I also refer to Walker v. Hersch, 27 Ch. D. 460, and Pawsey v. Armstrong, 18 Ch. D. 698.

As to the authority of a solicitor to compromise, I cite the case of In re Newan, Carruthers v. Newan, [1903] 1 Ch. 812. It is contended that the settlement was not made by the solicitor in this case, but by the partner Barrett. While the actual settlement is not signed by the solicitor, yet the evidence is that he was consulted and approved of it, and that it was virtually made by the solicitor advising with one of the clients. A great deal of trouble was taken to get the best opinion possible upon the right of action which the defendants had by way of counterclaim, and, after careful consultation, the solicitor advised it and approved of the settlement as being one made in the best interests of the defendants. I think the authorities are ample to support such a settlement made bona fide as this one was.

As to the power which Dr. Barrett had, under his power of attorney, to settle, I am in doubt as to whether the power of attorney is sufficient, standing by itself, to give him such power. It does not refer at all to partnership transactions, and, standing by itself, one could not say that it extended beyond the individual business of Donoghue separate and apart from any partnership dealings. However, I will not consider that matter further. I think that under his powers as a partner he had full power to settle and compromise, and I also think that the solicitor had full power to settle, and, therefore, I will confirm the settlement as being valid and binding against the defendants.

As to the costs of this issue, there will be no costs against Dr. Barrett, who has always stood by the settlement, and at the opening of the case it was so settled, that he should stand in that position, although the issue is drawn as if he were contesting. This was an error or oversight, and it was arranged at the opening of the trial. The defendant Barrett has never contested the settlement in any way, and has always been willing to maintain it, as he was at the trial of the issue.

YUKÓN TERRITORY.

CRAIG, J. OCTOBER 5TH, 1909.

TRIAL.

LLOYD v. NICHOLAS.

Mines and Minerals—Mineral Claim—Adverse Right—Plan of Survey—Invalidity—Quartz Mining Regulations—Staking—Field Notes—Topographical Indications—Contesting Location after Issue of Grant—Possession.

Action brought under the Quartz Mining Regulations, sec. 46, which provides that "persons having an adverse right of any kind in a mineral claim may take proceedings to declare plan of survey made and posted under section 45 or under section 63 invalid and non-effective so far as it concerns the right of the persons contesting;" and also provides for determination of right of possession.

J. B. Pattullo, K.C., and Tobin, for plaintiffs.

R. L. Ashbaugh, for defendant Evans.

Defendant Nicholas had disclaimed, and was not represented.

CRAIG, J.:—The plaintiff Lloyd staked the "Sunrise" mineral claim on 7th December, 1907, being assisted in the staking by one Thurber. Lloyd's evidence is that he wrote upon his initial post and his post No. 2 all that is required by the regulations to be written, namely, the name of the claim, the direction of his location line, the quantity of land taken to the right and left of the line, the length of his

line, and the date of location and name. Thurber swears that he himself wrote the location notices required by the regulations, and that Lloyd signed them. The evidence as to the posts is somewhat conflicting. Mr. Gibbons, D.L.S., who made the survey of this claim, the "Sunrise," says that the posts were good posts and had on them the compass bearing and everything else required, except that he found no date. He says the posts were somewhat weathered. Thurber says he put the date at the top. Barwell, D.L.S., who surveyed the "Mastodon," the conflicting claim, gives a very different description of the posts. He says they were only 2½ to 3 feet high; that they had on them an arrow and the figures "750" and no date; "it was an old stake reblazed, a year or less in age;" but he finds on the No. 2 post of the "Sunrise" staked by Lloyd, No. 1 of "Yellow Jacket" staked by Thurber, a full location notice signed by Thurber; and we have it in evidence that on the very same day Thurber aided Lloyd in staking the "Sunrise," the number 2 post of which was the number 1 post of Thurber's "Yellow Jacket." It is hard to understand how a man who at the very same time wrote the previous location notices for Lloyd, should have made such a marked difference in his work. Gibbons did not measure the posts. He says, speaking generally, that they were good posts. Lloyd described them very minutely; No. 1 had a 7-inch face; discovery, a 5-inch face; and No. 2 a 4 or 5-inch face; and being over 4 feet high. Lloyd says he cut out a clear line which was visible from No. 1 to No. 2 post which any one could see, and it is quite apparent he did this, because every one saw this line; even Mr. Barwell, who surveyed the conflicting claim, the "Mastodon," saw it; Thurber speaks of a conversation had with Mrs. Mitchell, the staker of the conflicting claim, in which she said she didn't intend to stake the "Sunrise," but another claim, the "Francetta." This evidence is not contradicted, although Mrs. Mitchell, the staker, was in Court. That the survey of Gibbons, D.L.S., conforms precisely to the staking of Lloyd is also abundantly clear, because the stakes have been seen repeatedly by different persons since locating, in the very position in which Gibbons found them when he made his survey. They were seen by Thurber and Lloyd himself, who did the representation work on the claim in the years following; they were seen by Moore, who staked the "Ottawa," adjoining the "Sunrise," he hav-

ing put his stake at the point of the No. 1 stake of the "Sunrise," and by other witnesses whom Lloyd took out to shew where vacant ground existed, pointing out to them that the ground to be staked, particularly the "Ottawa," was vacant ground adjoining the "Sunrise" previously staked by himself. Some little doubt was attempted to be thrown on Lloyd's evidence by shewing that he represented the "Sunrise" to be in a different position, but this totally failed. Some witnesses called to substantiate this position confirmed Lloyd rather than otherwise, while the evidence of the others was quite consistent with Lloyd's staking. Macfarlane, Mining Inspector, also visited the ground and saw the posts and the line clearly marked out. I take it then that the weight of evidence is very much in favour of the conclusion that Lloyd made a proper staking of the "Sunrise" claim.

On 30th July, 1908, Margaret Mitchell staked the "Mastodon," and the evidence of her own survey made by Barwell and of the survey made by Gibbons of the "Sunrise" shews clearly that her staking and plan conflict with the staking of Lloyd, and that there is an encroachment of 33.6 acres made by her. As to her staking, the evidence is that her compass bearings are absolutely wrong. Mr. Gibbons, D.L.S., swears that she is 90 degrees out. Her direction is in a southerly direction from post No. 1 to post No. 2, and her posts lie in an easterly direction at an angle of about 90 degrees astray, and her survey is made according to her posts, not according to her direction. Then, again, it is sworn that where her discovery post is planted no mineral in place is found; that no line or blaze indicates the direction from No. 1 to No. 2 post. This evidence is uncontradicted. The contest, then, is between the location of the "Sunrise" by Lloyd and the location of the "Mastodon" by Mrs. Mitchell. As to priority in time, of course there is no doubt of it. These claims were staked on the dates previously given. As to the plans themselves, it is in evidence and not contradicted that when Barwell was surveying the "Mastodon" Lloyd was during the survey present on the ground; that Barwell knew that his survey conflicted with the claim of Lloyd to the "Sunrise;" that he asked Lloyd no questions; took no evidence on the ground of stakes, and made no inquiries. Neither Barwell nor Gibbons swore their chainmen. Both contended that it was not necessary under the regulations. The Dominion Lands Act, in regard

to the work of surveyors, provides for the swearing of chainmen; but there are special regulations issued from the office of the Surveyor-General under this Act to surveyors who make surveys of claims in the Yukon Territory. Whether these special regulations are the only ones which govern surveyors, and exclude the operation of the general Act, is a question; but, applying the regulations themselves, regarding which there can be no doubt as to their application, I find that the plan made is defective. Sub-section c. of sec. 45, providing for the finality of such plans, provides that the claim be surveyed "in accordance with instructions from the Surveyor-General," and it follows that surveys not so made are ineffective. These regulations describe the nature of mineral claims and the duties of surveyors in surveying them. Very strict instructions are given regarding the instruments to be used. One regulation provides: "The surveyor shall measure the distance between posts Nos. 1 and 2 and ascertain by means of astronomical observations the azimuth of the location line; the observations must be given in full in the field-notes as well as the calculations; a note on the plan is to state that the bearings were obtained by astronomical observations and to indicate the point where the observations were made." No such note appears on the plan, and no evidence is given to me to shew that any such note appears in the field-notes. It is further provided that "instead of making astronomical observations it is permissible to deduce the bearings from the azimuth of a line of a survey confirmed by the Surveyor-General, or, in the Yukon Territory, of a survey accepted by the Examiner of Surveys; a note on the plan shall state that the bearings were so obtained and shall give the azimuth of the line from which the bearings were deduced." No such note as this in the alternative appears on the plan. It is expressly provided that "bearings deduced from the compass bearings corrected for variations will not be accepted." Upon the plan of the "Mastodon" we have no indidation of the points of compass whatever, except that we find on the lines of the claims the boundaries and location lines. The compass direction, for example, the location line of the "Mastodon," is put at N. 63 degrees, 47 minutes west. What I presume is the location line (although it is not so marked off to indicate that it is his location line) is the line between the letters "I.P. 1" and "I.P. 2." So that one cannot, from the lines shewing

the boundaries, make any comparison with the compass bearings, because there are none upon the map. Further, "the survey is to be connected by a traverse with the nearest confirmed survey, or, in the Yukon Territory, with the nearest accepted by the Examiner of Surveys; where the nearest survey is at a distance exceeding 3 miles, the connecting traverse may be dispensed with, but the surveyor must supply sufficient information to place the claim approximately on the maps; connection must be made with the boundary of adjoining lots or claims, if any." Neither of these provisions is complied with. Every intersecting boundary of an adjoining lot or claim is to be retraced as far as the nearest corner. This is not done. Further, "the position of the discovery post is to be ascertained." There is no discovery post marked on this plan of the "Mastodon." Further, "the plan must also shew the nearest corners and boundaries of the adjoining lots and mineral claims, if any; the position of every post; the topographical features of the ground." This is not done. Not a single topographical feature appears anywhere on the plan. "The plan must be accompanied by field notes giving the usual information required by the Manual of Survey." Among the particulars to be noted are the date of the instructions of the Surveyor-General, tables of latitudes and departures of connecting traverses, the date of the survey of every line, the astronomical observations for azimuth, if any, and the calculations thereof, and, in particular, a full description of every post or boundary mark erected or found on the ground, the kind of wood for every post, and the marks thereon. It is absolutely beyond doubt that posts conflicting with the survey of the "Mastodon" were on the ground and were seen by the surveyor, that a well-cut line was seen by him, and was so apparent that every one going on the ground observed it at once. These were the posts of the conflicting claim, the "Sunrise," against which it is apparent he was surveying the "Mastodon," and he was surveying the "Mastodon" for the very purpose of defeating the rights of the locator of the "Sunrise." Whether or not these posts were good posts was not for him to say. The surveyor who surveyed the "Sunrise," so far as I can learn, followed very minutely the directions given and took note of the posts which he found and what was found upon them. Mr. Barwell in his evidence upon this point says that his survey corresponds with the survey of Mr. Gibbons in

so-far as the position of the posts is concerned; that he found certain posts, indicating the "Sunrise" and the "Ottawa," adjoining claims, and says what he found upon them; but he took no note of what was written on the stakes in his field notes or any note book, and that he did not indicate any such conflicting post either on the plan or in his field notes. On cross-examination he says that he prepared the plan of the "Mastodon." This plan shews no "Sunrise" claim or any other post. He says: "I think the plan would have been approved by Director of Surveys if he had known that such posts existed and had been ignored by me; I do not think the Director of Surveys compares my field notes with the records." He produced his field notes, a copy of those filed with the plan, and these field notes do not shew the "Sunrise" mineral claim in any way. He admits that the instructions of the Surveyor-General require him to shew all monuments and conflicting claims, but that he thought it was his duty to ignore all other claims which he considered invalid and not to mention them either in the plan or field notes or book. Therefore, in speaking of what the other posts had writte on them or indicated, he spoke from memory and not from any notes taken at the time. He took no evidence on the ground, and he took his instructions from Mrs. Mitchell, the contesting applicant for the "Mastodon" claim; he thought that the only duty of the local Director of Surveys was to compare his plan with previous surveys and granted claims. Mr. Barwell justifies the position which he takes as a surveyor by saying that he had the right to ignore every indication on the ground which he considered invalid and illegal; in other words, he was presuming as a surveyor to pass upon the legality of the staking of the "Sunrise," and he shut out all notice of it from his plan. In connection with Mr. Barwell's statement that the local Director of Surveys would pass his plan, even if he knew that by the records conflicting claims existed, I can only say this, that I do not know what the duties of the local Director of Surveys are. Those duties are, no doubt, fixed by his appointment, but he cannot get away from the instructions of the Surveyor-General; and it would seem to me that his functions would include at least a checking of the surveyor's work as a surveyor; and that, if a plan is totally wanting in the requirements laid down by the directions of the Surveyor-General, such a plan should be rejected. Apart al-

together from the question of conflict with existing surveys or other claims, the plan itself should in other respects be in conformity with the directions and should be such a plan as on publication would give notice at least of the locality in which the property lay. The plan I am considering does not tell, nor can any one find out from the plan, where the property is situated. It might as well be on the Stewart river or Forty-Mile river or Sixty-Mile river, in the Yukon Territory, as anywhere else, so far as any indication on the plan goes, and its total absence of topagraphical indications would leave an inquirer helpless in ascertaining what his rights were if they conflicted with the plan. The object of the Act which provides for publication, and by publication the finality, of surveys, is to give notice and to permit persons having conflicting claims to raise the issue and have the matter disposed of by the proper authority, which is this Court. So far as any indication on the plan goes, no one could tell where on the face of the earth the "Mastodon" mineral claim was. The description of the plan is as follows: "Plan of Survey of the 'Little Minnie,' 'Mastodon,' M.C.'s lots 413, 414, group 2, Y.T.; scale 200 feet to 1 inch." Now, "Y.T." may mean Yukon Territory; but these are the only letters or words which indicate where this property is. The survey might have been of claims on any river or creek, or in any locality in the Yukon Territory, for all that any topographical indication shews. The directions of the Surveyor-General provide that the title must state the name of the mineral claim, the name of the province, provisional district, or territory in which it is situated, thus: "Plan of the Sunset Mineral Claim, Provisional District of Ungava." I do not think the letters "Y.T." conform to these requirements, and the total absence of topographical indications renders the plan to my mind absolutely useless as a notice to the world of where the claims are or what the person is seeking to establish by the survey and publication. The plan of "Sunrise" is also defective in this respect. If a surveyor is in this arbitrary manner to conclude the rights of the parties, then it is time that the regulations are amended or surveyors better instructed in their duties. I consider the plan of the survey of the "Mastodon" to be wholly wanting in the requirements of the regulations and of the instructions given to surveyors, and not to be such a

plan as I can confirm or declare valid under the section mentioned.

In any case, as the law of this Territory now stands, as embodied in the decision of Noakes v. Gosselin and McDougall v. Johansen, 9 W. L. R. 151, decided by the Court en banc, and other cases, no one but the Crown, without the leave of the Attorney-General, has any right to contest a prior location, no matter how invalid that location may be, after the issue of a grant or certificate of title. The "Sunrise" was an existing mineral claim known to be such at the time when the staker of the "Mastodon" deliberately went on and placed her stakes on top of it. It has been held by the Court en banc here that any informality in staking, in fact, a total want of capacity to stake, shall not render invalid a prior staking, provided that a grant or certificate of title or a lease has been given to the prior locator, and when the staking of the contesting party relying upon the invalidity of the staking is not made until after the issue of the grant, certificate, or lease. It is well known that I do not agree in full with this finding, and I have always held that staking is the root of title, and invalidity of staking, especially in placer, gives a right to a free miner to stake over and contest the legality of the staking; but I am bound by these judgments and I hold in this case that the staking of Lloyd was a good and sufficient staking, and that the staking of Mitchell was invalid and bad, and that her plan is defective, and she will, therefore, obtain no rights under her staking or survey or publication, and I declare the survey of the "Mastodon" mineral claim unlawful and improper and contrary to law, and that it includes that portion of the plaintiffs' mineral claim, the "Sunrise" shewn on the plan of survey made by James Gibbons, D.L.S., and to that extent is invalid, and that the plaintiffs are entitled to possession of the "Sunrise" mineral claim as surveyed by Gibbons, D.L.S., with the costs of this action.

MANITOBA.

OCTOBER 14TH, 1909.

COURT OF APPEAL.

HYNDMAN v. STEPHENS.

Master and Servant—Injury to Servant—Action for Compensation — Trial — Suggestion to Jury that Defendant Insured against Accidents to Workmen — New Trial — Evidence.

Appeal by the defendant from the judgment of HOWELL, C.J.A., in favour of the plaintiff, upon the findings of a jury, in an action by a labourer against his employer to recover damages for injury sustained owing to the negligence of the defendant, as alleged.

The judgment of the Court (RICHARDS, PERDUE, and CAMERON, JJ.A.), was delivered by

CAMERON, J.A.:—This action is brought by the plaintiff, a labourer, against the defendant, to recover damages for the loss of his arm which was caught in machinery used for making brick. The action was tried at the Portage la Prairie Assizes, on 16th March, 1909, before the learned Chief Justice of this Court. Certain questions were propounded to the jury, who gave an alternative verdict of $1,500 or $5,000 according as it should be held that the action was under the Workmen's Compensation Act or otherwise.

At the trial the defendant, Henry Stephens, was asked the following question by the plaintiff's counsel: "Will you state if the company is indemnified against all loss in the event of the action going against the company?"

The question was objected to by the counsel for the defendant, was not required by the Chief Justice to be answered, and was not answered.

In Loughead v. Collingwood Shipbuilding Co., 16 O. L. R. at p. 65, Chief Justice Falconbridge expresses himself thus on questions of this kind: "It would be absurd, I humbly think, for us to affect not to know what is notorious, namely, that defences by or on behalf of insurance companies are not favoured, but the reverse, by juries. If it came to

the knowledge of a jury that the defence is not by or on behalf of one of their neighbours, but of an insurance company which is paid to protest the neighbour against just such risks, this must have a strong effect upon them in arriving at a conclusion. . . Therefore, the improper practice of trying to inform the jury who the real defendant is ought to be stamped out. The mere putting of the question does all the mischief. The jury will draw their own inferences from the objection taken by defendant's counsel and the ruling of the Court. The real defendant is placed in a position of manifest and incurable disadvantage." Mr. Justice Riddell concurred with the Chief Justice, while Mr. Justice Anglin delivered a dissenting judgment. The decision of the majority was unanimously upheld by the Court of Appeal: 12 O. W. R. 697.

Defendant's counsel referred to a number of decisions in the United States Courts. In the case of Coe v. Van Why, 3 Am. & Eng. Annotated Cases 552, the Supreme Court of Colorado held it improper for counsel in his address to the jury to comment on the custom of employers of carrying insurance against liablity for accidents to their employees, and set aside a judgment for the plaintiff, notwithstanding that the Judge had instructed the jury that the remarks should not be considered for any purpose. In the note to the last named case the editors refer to the various decisions on the subject: Manigold v. Black River, 82 N. Y. App. Div. 381; Barrett v. Borham, 57 S. W. R. 602; Iverson v. Macdonell, 78 Pac. R. 202; Shatton v. Nicholls, 81 Pac. R. 821; and Westly v. Washington Brick Co., 82 Pac. R. 271, where it was held that questions asked by plaintiff's counsel on cross-examination of the defendant's manager, for the purpose of getting before the jury the fact that an insurance company, and not the defendant, would be called upon to respond to such damages as the jury might assess, were improper and a ground for reversal of judgment, notwithstanding that the questions were objected to and that the objections were sustained. In Casselman v. Dunfee, 65 N. E. R. 494, the New York Court of Appeal held that the propounding to a witness for the defence of the question, "Do you know whether they carry insurance for accident to their employees?" (which was objected to as incompetent and the objection sustained) was calculated to convey an improper impression to the jury. The inquiry into the matter of insurance is not ma-

terial, and the practice of asking a question that counsel must be assumed to know cannot be answered, is highly reprehensible.

In my opinion, there must be a new trial.

MANITOBA.

MATHERS, J. OCTOBER 15TH, 1909.

CHAMBERS.

FERNIE v. KENNEDY.

Pleading — Counterclaim — Parties — New Defendant by Counterclaim—Rule 295 — Relief Sought—Specific Performance—Damages.

Appeal by the defendant from an order of the Referee in Chambers striking out the counterclaim.

R. A. C. Manning, for defendant and plaintiff by counterclaim.

A. E. Hoskin, K.C., for plaintiff and defendants by counterclaim.

MATHERS, J.:—This action is brought by the registered owner of land to remove a caveat filed by the defendant.

By the defence it is alleged, amongst other things, that one T. J. Fernie agreed in writing to sell the land to the defendant; that he was a co-owner with the plaintiff, and in executing the agreement he acted on behalf of himself and the plaintiff, and was authorised to do so.

By way of counterclaim the defendant claimed specific performance as against the plaintiff and T. J. Fernie, and has proceeded against the latter as provided in Rule 295 et seq.

In addition to specific performance, the defendant in the alternative seeks damages against T. J. Fernie for breach of warranty of authority.

The learned Referee struck out the whole counterclaim, and the defendant has appealed.

Rule 294 recognises the right of a defendant to set up by way of counterclaim any question between himself and the

plaintiff along with any other person. It seems clear to my mind that the defendant, in seeking specific performance against the plaintiff and T. J. Fernie, is within that Rule, and that the Referee erred in striking out that part of the counterclaim. It seems equally clear that, in so far as he claims damages against T. J. Fernie by way of alternative relief, he is not within the Rule. Such a claim raises no question between the defendant and plaintiff along with T. J. Fernie.

The appeal will be allowed except in so far as the order of the Referee applies to paragraph 11 of the defence and counterclaim and paragraph 4 of the prayer for relief, with costs of appeal to the defendant in any event as against both the plaintiff and T. J. Fernie.

MANITOBA.

OCTOBER 18TH, 1909.

COURT OF APPEAL.

KELLY v. CITY OF WINNIPEG.

Costs — Taxation — Claim and Counterclaim — Judgment —Construction of — Method of Taxation — Set-off — Appeal.

Appeal by the plaintiffs from an order of MACDONALD, J., in Chambers, made upon appeals from the taxation of the costs by the taxing Master.

The appeal was heard by HOWELL, C.J.A., PERDUE and CAMERON, JJ.A.

W. B. Towers, for plaintiffs.

T. A. Hunt, for defendants.

HOWELL, C.J.A.:—The judgment delivered in this cause on 6th November, 1908, is reported in 18 Man. L. R. 269, 9 W. L. R. 310.

The statement of defence asked that the sum of $1,043.14, the real sum in dispute, should be paid over to the workmen

or administered by the Court for them. After judgment was delivered, and on 11th November, the trial Judge made an order amending the pleadings so as to make the defence a counterclaim and on 13th November formal judgment was prepared by the plaintiffs and entered, the vital portion of which is as follows: "It is this day adjudged that the plaintiffs recover from the defendants the sum of $1,043.14 and costs to be taxed, and that the defendants recover from the plaintiffs upon their counterclaim the sum of $1 damages and costs to be taxed."

Bills of costs were brought in by both parties and taxed, and appeals were had to the trial Judge, who made orders as to the taxation, and the whole matter came before this Court by way of appeal.

The final judgment stands and the taxation must take place according to its terms. By this judgment the defendants' contention is treated as a counterclaim, and they are to have the costs of it.

At the trial the plaintiffs contended that, as a fact, they did not agree to pay a higher rate of wages than that paid, but the trial Judge on this issue decided against them, and apparently this was treated as a breach of contract, the damages for which were assessed at $1.

Notwithstanding the fact being found against the plaintiffs, the learned Judge in law held that the defendants could not retain this money, as the workmen were not parties to the suit, and so he found for the plaintiffs for the sum above mentioned.

We must construe this judgment in the light of the pleadings and evidence, and I think the meaning to be given to it is, that the plaintiffs are entitled to costs of suit, but they are not to be allowed counsel fees or witness fees for contesting the fact found against them as above stated, for these costs are costs on the issue found for the defendants, called in the judgment "counterclaim." The defendants are entitled to counsel fees and witness fees required to establish the fact found in their favour and to the briefs and pleadings alleging these facts, and, of course, bills of costs and taxation.

The defence being treated by the judgment as a counterclaim, and there being no order for set-off, each bill of costs is a separate charge to be paid by the other side.

The appeals are allowed and the bills of costs remitted to the taxing Master to be taxed as he best can on the principles above stated.

There will be no costs of appeal.

PERDUE, J.A.:—This is an appeal from an order made by Macdonald, J., on an appeal from the taxing officer. The case was tried before the same Judge, and a report of his decision is to be found in 18 Man. L. R. 269, 9 W. L. R. 310. The plaintiffs sued for the amount of a progress estimate for work done under a contract for the building of certain bridge piers. The action was brought for $6,833.26. Of this amount the defendants paid into Court $5,790,12, retaining in their hands the sum of $1,043.14, which the defendants contended should have been paid by the plaintiffs to their workmen, upon the ground that the plaintiffs paid less wages than they should have paid under the schedule of wages referred to in the contract.

By the statement of defence the defendants disputed practically every allegation contained in the statement of claim. The defendants then set up that the plaintiffs had contracted to pay a certain rate of wages, and that they had paid less than this rate to the workmen employed, whereby these workmen were underpaid to the extent of $1,043.14, and this amount the defendants retained in their hands, paying the balance of the progress estimate into Court. The defendants asked for a declaration: (a) that the plaintiffs had failed to comply with the terms of the contract; (b) that the moneys representing the amount of unpaid wages retained by the defendants should be paid to the workmen, claimants, under the supervision of the Court. None of the workmen employed by the plaintiffs were parties to the suit, nor was there any party to the suit representing them.

Upon reading the learned trial Judge's judgment it is evident that the defendants insisted upon the non-observance of the term in regard to schedule wages as a defence in respect of the sum held back by them. He says: "The plaintiffs paid their men under their arrangement with them a lesser wage than in the agreement provided for, and this is the ground of complaint of the defendant corporation and the reason for its resistance to the payment of the balance which it is contended still belongs to the workmen. However commendable the action of the civic authorities may be

in their efforts to protect the working classes, I cannot see how the defendant corporation can successfully resist the plaintiffs' demand. The city might have been justified in withholding the progress estimate, in which event it might have been difficult for the plaintiffs to recover without first settling for wages on basis of 'fair wage schedule,' but, after progress estimate had issued and after deposit of pay-rolls shewing workmen paid in full, the contractor at once became entitled to the amount certified due him. The workmen have no claim upon the defendant corporation. They are not parties to this issue nor before the Court, and it is not established that the corporation has sustained any damage."

The trial Judge therefore gave judgment against the defendants, and entered a judgment in favour of the plaintiffs for the amount claimed together with the costs of suit. But the trial Judge, after pointing out that there had been a breach of contract on the part of the plaintiffs, declared that the defendants were entitled to succeed on their counterclaim, and that there should be judgment thereon in their favour for $1 and costs incident to the counterclaim.

Now the trial Judge, in giving judgment as above, overlooked the fact that there was no counterclaim whatsoever set up by the defendants in the action. After he had given judgment and the condition of the pleadings had been pointed out to him, on 11th November, 1908, he made an order allowing the defendants to amend the statement of defence by altering the title thereof to read "statement of defence and counterclaim," and by adding a paragraph to the statement of defence to read as follows: "9. And by way of counterclaim the defendants repeat the allegations contained in paragraphs 1, 2, 3, 4, and 5, above, and claim alternatively $1,043.14 damages for the plaintiffs' breach of contract.

Upon the taxation of the costs various objections were taken by the defendants against the ruling of the taxing officer, and on appeal to Macdonald, J., by an order made on 25th February last, he directed that the plaintiffs' bill of costs be referred back to the taxing officer, who was directed to revise his taxation and to allow the plaintiffs only such of the items or portion thereof as may be part of the plaintiffs' general costs of action and to disallow the items or any portions thereof which were incurred by the plaintiffs in opposing the defendants' claim for a declaration of breach

of contract and counterclaim. This order was not appealed from.

On the matter being referred back to the taxing officer, he disallowed the costs of the application put in by the plaintiffs in answer to the defendants' statement of defence. He also allowed the plaintiffs a counsel fee of $75, while he gave the defendants two counsel fees, amounting, in the aggregate, to $115. A large number of objections were taken by the plaintiffs to the costs allowed to the defendants, but, in the view I take of the case, it is not necessary to particularise the items in respect of which the objections were raised.

Two appeals were taken by the plaintiffs from the taxing officer's taxation of the bills, to Macdonald, J., one in respect of the plaintiffs' costs and one in respect of the costs taxed to the defendants. On the 7th May the appeals were heard, and that relating to the taxation of the defendants' costs was dismissed, while that relating to the plaintiffs' bill was allowed to the extent that the bill was referred back to the taxing officer with instructions to allow to the plaintiffs paragraph 6 of their reply and the costs incidental thereto.

It is clear that the plaintiffs were entitled under the judgment to the general costs of the action. It has been held over and over again that a claim and a counterclaim are to be treated as separate actions, and that the costs are to be taxed in accordance with that principle: Haggert v. Town of Brampton, 17 P. R. 477, and cases therein referred to.

In a late case in the Court of Appeal in England it was held that in an action where there is a claim and counterclaim the party ordered to pay or receive the costs of action pays or receives the whole of such costs as if there were no counterclaim: Atlas Metal Co. v. Miller, [1898] 2 Q. B. 500. The plaintiff was therefore entitled to his full costs of action, and he was entitled to the costs of his replication if a replication was necessary. Upon reading over the replication in this case, I cannot see any reason why the plaintiffs should have been deprived of the costs of it.

The taxing officer appears to have allowed the plaintiffs $150 in the first instance, but upon it being referred back to him he only gave the plaintiffs $75. I see no reason for his making this reduction. The proceedings at the trial were prolonged by the defence set up by the defendants,

which it was necessary for the plaintiffs to meet and overcome. The evidence put in by the defendants was put in for the purpose of a defence and for no other purpose. I see no sufficient reason for the reduction of the counsel fee upon the bill being referred back to the taxing officer under the order of 25th February.

As regards the alleged counterclaim, this had no existence until after the trial took place. The learned trial Judge was in error in believing there was a counterclaim and in giving $1 damages, when, as a matter of fact, no counterclaim existed. The evidence that was put in by defendants at the trial was just as applicable to the line of defence taken by the defendants as it would have been in respect of a counterclaim for damages, if there had been such a counterclaim upon the record, and the evidence was put in under a defence and not under a counterclaim. The defendants failed in the line of defence which they took, but it was necessary for the plaintiffs to meet and combat that line of defence. Therefore the plaintiffs should be entitled to recover all costs that were properly incurred in respect of the issues upon which they went to trial.

The counterclaim having been only added after the trial, there could be no costs incurred in respect of that counterclaim up to and during the trial. It is clear from the authorities above referred to that a counterclaim is exactly the same as a cross-action. If there is no cross-action, how can there be costs in respect of it? It was urged that the evidence which would support the counterclaim was taken at the trial, although there was no counterclaim before the Court, that the formal addition of a counterclaim might be made at any time, there being evidence to support it, and that therefore the costs of the counterclaim and the evidence supporting it should be allowed the defendants.

There is a two-fold answer to this contention. In the first place, the evidence which might support the counterclaim was put in only by way of defence to the plaintiffs' claim, which defence still stood upon the record even after the counterclaim was added. In the second place, the counterclaim is to be treated as an independent action (per Lord Esher in Shrapnel v. Laing, 20 Q. B. D. at p. 338); and there can be no costs of an action until it has been commenced. There was no counterclaim entered until after the trial was over. As Lord Lindley points out in Atlas Metal

Co. v. Miller, [1898] 2 Q. B. at p. 505: "No costs not incurred by reason of the counterclaim can be costs of the counterclaim." It is difficult to see what costs there could be of the counterclaim in this action except the mere costs of preparing it and filing it, but the order allowing the counterclaim to be added should have provided for such costs and does not.

I think the appeal, in respect to the plaintiffs' costs, should be allowed to the extent of giving them costs of the replication and the counsel fee as originally taxed. The plaintiffs should also succeed upon the appeal in respect of the defendants' costs, and all items thereof should be allowed. The plaintiffs should be entitled to the costs of both appeals in this Court.

CAMERON, J.A., concurred with HOWELL, C.J.A.

MANITOBA.

MACDONALD, J. OCTOBER 20TH, 1909.

TRIAL.

MITCHELL v. RUTHERFORD.

Mortgage — Second Mortgage — Purchase by Mortgagor at Sale under First Mortgage — Liability under Second Mortgage—Real Property Limitation Act—Husband and Wife—Agency of Husband—Acknowledgment.

Action on the covenant for payment contained in a mortgage deed, and in default of payment for foreclosure.

C. P. Wilson, K.C., and A. M. S. Ross, for plaintiffs.

R. G. Affleck and A. G. Kemp, for defendants.

MACDONALD, J.:—The plaintiffs bring this action on a mortgage dated the 1st December, 1892, made by Mary Rutherford as mortgagor to Robert Henry Hayward as mortgagee, and assigned to W. J. Mitchell, whose executors are

the plaintiffs. The remedy sought is on the covenant in the mortgage for payment of the amount due under the mortgage, and in default foreclosure of the equity of redemption.

The defendant Peter Rutherford claims to be the owner in fee simple of the lands in the said mortgage described, but denies that his title is subject to the mortgage referred to, and alleges that such mortgage is not a lien or charge upon the said lands, that he acquired title thereto under mortgage sale proceedings had and taken by the holders of a mortgage on said lands having priority to the mortgage of the plaintiff, and that, by reason of and at the time of the said mortgage sale proceedings, the said Hayward mortgage ceased to be a lien or charge on said lands.

Both defendants claim the benefit of all statutes of limitation in that behalf, and particularly the benefit of the statute of the province of Manitoba known as the Real Property Limitation Act, R. S. M. 1902 ch. 100; and the defendant Mary Rutherford alleges that no estate or interest in the said lands is now vested in her, and that she has had no interest therein since 1st May, 1902.

The defendant Mary Rutherford had on 11th January, 1892, mortgaged the lands in question to the North British Canadian Investment Company Limited, and under this mortgage the sale proceedings referred to were taken, through which the defendant Peter Rutherford claims title. These sale proceedings proved abortive, and the defendants continued in possession as tenants to the said company until 1st May, 1902, when an agreement of sale was entered into, by which the defendant Mary Rutherford became the purchaser, and by reason of these sale proceedings the defendants contend that the title of the second mortgage is thereby defeated.

The law is clear that a mortgagor cannot defeat his own mortgage by purchasing a paramount title.

"The general principle that a mortgagor cannot set up against his own incumbrancer any other incumbrance created by himself is a proposition that has never been controverted:" Otter v. Lord Vaux, 6 D. M. & G. 638.

The defendant Peter Rutherford attempts to overcome the position which this condition placed them in by asserting that it was he who purchased the property from the

North British Canadian Investment Co., and that, owing to being in financial straits at the time, he took the agreement in the name of his wife, the defendant Mary Rutherford, who was simply a trustee for him of the property; by this means endeavouring to cut out the title of the second mortgagee. To give effect to this would seem to me to be lending the Courts for the perpetration of a fraud. The subsequent conduct of the defendants shews clearly that it was not the intention to disturb the rights of the second mortgagee.

The second mortgagee, thinking that his remedy under his mortgage would shortly be barred, on 30th May, 1903, secured an acknowledgment from the defendant Peter Rutherford by a payment of 50 cents on account of the moneys secured by the mortgage, but it is contended that this would not create a new starting point for the Statute of Limitations to begin to run, because the payment was not made by the party liable, nor by her agent. The defendant Peter Rutherford claims to have been the owner at the time, and the statute would not, as against him, begin to run until after that date, and, considering the fact that he had acted in all matters connected with this property, I feel that I am safe in holding that he was acting as agent for his co-defendant.

In 1903 sale proceedings had been commenced under the second mortgage, and in the month of August of that year a settlement had been effected, and, as a part of this settlement, both defendants joined in a note for $200, and this note was paid. The defendant now denies that his wife joined in that note, but his declaration made in July, 1905, that she did so join, is more likely to be correct than his memory upwards of 4 years later. This is surely a sufficient acknowledgment of the debt to cause it to revive, if the Statute of Limitations would, without such acknowledgment, be a bar to the action.

On all points raised by the defence they must fail.

There will be judgment against the defendant Mary Rutherford for the amount claimed with costs, and in default of payment foreclosure of the equity of redemption of the defendants in the lands in the pleadings described.

MANITOBA.

MACDONALD, J. OCTOBER 22ND, 1909.

CHAMBERS.

REX v. PEPPER.

Criminal Law—Vagrancy—Prostitute not Giving Satisfactory Account of herself—Plea of Guilty — Conviction — Request not Disclosed—Summary Trial—Habeds Corpus.

Application for a writ of habeas corpus.

P. E. Hagel, for the prisoner.

H. W. Whitla, for the prosecutor.

MACDONALD, J.:—An information was laid against the prisoner for "being a common prostitute or night walker on the streets in the city of Winnipeg, not giving a satisfactory account of herself, and is thereby a loose, idle, and disorderly person and a vagrant."

Upon this charge being read out to her, the accused pleaded "guilty," and the conviction followed, the charge being in the words of the information as above recited.

Objection is taken that habeas corpus is not the proper remedy in case of a conviction upon a summary trial, even if the conviction is bad. This proceeding has been the practice in this province for years, and, in my opinion, it is the proper one and within the purview of the Habeas Corpus Act, 31 Car. II. See Regina v. Osberg, 15 Man. L. R. 147; Regina v. Young, 14 Man. L. R. 58; Regina v. McEwan, 17 Man. L. R. 477; Rex v. Harris, 13 Can. Crim. Cas. 393.

The objection to the information and conviction is that they did not state any offence.

To constitute this charge an offence under the statute, it must be shewn that the woman was asked to give an account of herself. Sub-section (*i*) of sec. 238 of the Code, R. S. C. 1906, does not mean that being a prostitute or a night walker makes such a person liable to punishment as such,

but only those prostitutes who when found wandering about and when requested to give an account of themselves are unable to give a satisfactory account of themselves. So that where under a section of the Canadian Vagrant Act (32 & 33 Vict. ch. 28), similar in effect to sub-sec. (*i*) of sec. 238 of the Code, a woman was convicted of being a common prostitute and of wandering in the public streets and not giving a satisfactory account of herself, the conviction was held illegal because it did not allege that the woman was asked before being taken, or when she was being taken, to give an account of herself, and it was further held that an allegation "she giving no satisfactory account" does not shew that any prior demand was made upon her to give an account of herself: Regina v. Levecque, 30 U. C. R. 509.

It was held, also, in Regina v. Arscott, 9 O. R. 541, that the Vagrant Act, 32 & 33 Vict. ch. 28, sec. 1, does not, on its true construction, declare that being a prostitute would make such a person liable as such, but only those who when found, on request or demand, are unable to give a satisfactory account of themselves.

The demand or request to give an account of themselves and inability to do so satisfactorily is the material part of the offence, and this must be charged in the information and followed in the conviction to make the conviction legal.

It is contended that the plea of guilty, without objection to the information, waived the objection now taken: Paley, 7th ed., p. 116.

The confession goes no further than the matter charged.

The prisoner here pleaded guilty to certain irregularities that do not, as they are charged, create an offence within the Code, and, as they do not create such an offence, no punishment can be meted out to her.

It is agreed that the case should be dealt with as if on the return to a writ of habeas corpus. I, therefore, order the accused to be discharged from custody.

There will be no costs to either party.

MANITOBA.

MATHERS, J. OCTOBER 26TH, 1909.

SINGLE COURT

FOSTER v. STIFFLER.

Vendor and Purchaser—Exchange of Lands—Incumbrances Exceeding Amount Represented—Absence of False Representation—Transaction Completed by Conveyance — Merger of Contract — Covenant — Compensation—Warranty—Vendor's Lien.

Appeal by the defendant from a Master's report.

A. E. Hoskin, K.C., and P. J. Montague, for defendant.

G. A. Stewart Potts, for plaintiff.

MATHERS, J.:—The plaintiff and defendant agreed to exchange certain properties, and entered into a written agreement to that effect, the essential portions of which are as follows: 'The said parties herein mentioned agree to exchange the following properties on the following basis and values: William Foster, the party of the first part, agrees to purchase from John Stiffler, the party of the second part (here follows description of certain property in Sherbrooke street in the city of Winnipeg), for the sum of $11,200, assuming the sum of $5,500 on the said property; and John Stiffler, the party of the second part, agrees to purchase from William Foster, the party of the first part, the north-west quarter and west half of the north-east quarter of section 22 and the north half of the north-east quarter of section 27, township 15, range 3, east, for the sum of $10,500, including implements, stock, and crop as per inventory attached, assuming the sum of $200 on the said north half of the north-east quarter of section 27, township 15, range 3, east, and give $4,600 in two mortgages. The said parties agree to raise a first mortgage on the said north-west quarter and west half of the north-east quarter of section 22, township 15, range 3, east, the proceeds to be paid to said William Foster, and the said William Foster to take second mortgage for the balance, payable $100 yearly, interest at

7 per cent. per annum; first payment to be made December 1st, 1909; interest, taxes, and insurance to be adjusted to date; titles to be satisfactory."

The parties proceeded to carry out the transaction on the apparent assumption that $5,500 was the total incumbrance against the Winnipeg property, and that $200 was the total incumbrance against the farm lands, and that $4,600, which was, on that basis, the difference in value, was to be paid or secured in the manner set out in the agreement.

A first mortgage was raised on the north-west quarter and west half of the north-east quarter of section 22, township 15, range 3, east, and the proceeds, amounting to $1,938.15, were paid to the plaintiff; but the second mortgage spoken of in the last paragraph of the agreement has not been given. The plaintiff has conveyed to the defendant the farm land lastly mentioned, but has not yet conveyed the north half of the north-east quarter of section 27, township 15, range 3, east. The Winnipeg property has been vested in the plaintiff by two transfers, one of which is expressed to be subject to a mortgage in favour of the Ontario Loan and Debenture Company, dated 19th July, 1906, and subject also to a mortgage in favour of H. H. Bradburn, and subject to a by-law of the city of Winnipeg, and to notice of sale, and to a mechanics' lien. That transfer is from the defendant to the plaintiff. The other Winnipeg property did not stand in the name of the defendant, but was held by him under an agreement of sale on which there was still a balance owing. That transfer is made by Gabriel Howells, of the city of Vancouver, direct to the plaintiff, and is subject to no incumbrance.

After the transaction had proceeded this far, the plaintiff discovered that the incumbrances against the Winnipeg property were considerably in excess of $5,500. He appears to have paid the excess, and he has brought this action to recover the amount from the defendant, and for a vendor's lien on the farm lands for the amount for which the second mortgage ought to be given, and for further and other relief.

The exact amount by which the incumbrances on the Winnipeg property exceeded $5,500 is admitted to be $950. The Master has found that the plaintiff is entitled to recover that sum, and has found the plaintiff also entitled to

a vendor's lien for the sum of $2,661.85, being the difference between the $4,600 mentioned in the agreement and the proceeds of the first mortgage placed by the parties on the north-west quarter and the west half of the north-east quarter of section 22, township 15, range 3, east.

To the Master's finding in favour of a lien no exception is taken, but it is contended that no case was made for the recovery of the $950.

The plaintiff bases his right to recover this sum on the agreement before quoted. This appears from paragraphs 6 and 7 of the statement of claim, which are as follows:—

"6. After entering into said agreement, the plaintiff discovered that the incumbrance on the house properties to be conveyed by the defendant to the plaintiff, were far in excess of $5,500, as mentioned in the said agreement, and the plaintiff was compelled to expend the sum of $1,052.19 in reducing the incumbrances on the said house properties, to the amount mentioned in the said agreement, and in placing the titles to such properties in proper shape.

"7. The said sum of $1,052.19 is due by the defendant to the plaintiff under the said agreement, and is payable as a condition precedent to the plaintiff carrying out the obligations upon him imposed by the agreement, and the plaintiff is willing and hereby submits to this honourable Court that, upon the defendant carrying out his agreement in that behalf, he will convey to the defendant the other farm property mentioned in the said agreement."

It is not charged that the defendant made any false or fraudulent representation with respect to the amount of incumbrances on the Winnipeg property. The sum of $5,500 mentioned in the agreement appears to have been accepted by both parties as the total amount of the incumbrance.

The general rule is that, after completion of the transaction by conveyance, the purchaser is not entitled to any relief, subject to certain exceptions which I shall hereafter refer to. Lord Justice James has, in Leggatt v. Baratt, 15 Ch. D. at p. 309, stated the law as it is generally accepted: see per Fry, L.J., in Palmer v. Johnston, 13 Q. B. D. at p. 359. He says: "If parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and you have no right whatever to look at the contract, although it is recited in the deed, except for the

purpose of construing the deed itself." In other words, it is said that the contract becomes merged in the deed. But, if the contract contain any stipulation which is collateral to the main duties of proving title, conveyance, and payment, the obligation so incurred is not discharged by the performance of these duties: Williams on Vendors and Purchasers, p. 922. The ordinary contract for compensation is construed, not as one which is intended to be carried out by the deed of conveyance, but as continuing to exist outside it: Dart on Vendors and Purchasers, 7th ed., p. 813. In the present case the conveyance was by transfers under the Real Property Act, containing no covenants by the vendor, either expressed or implied.

It was for a long time assumed to be the law that, in the absence of fraud, where the purchaser had parted with his purchase money, he was without remedy unless he had protected himself by a covenant in the conveyance. This is very clearly shewn by a large number of authorities, beginning with Serjeant Maynard's Case, Freeman 2, decided in 1676. In that case the purchaser paid his money and took a bond for its repayment if a recovery should not be suffered within 3 years upon reconveying the land. The vendor tendered a recovery, but before it was suffered a third person made title to the land. The Court held that a recovery being suffered according to the agreement, though nothing passed by it, the purchaser could not recover his purchase money, as there was no covenant. Relief in such a case would probably be granted on the ground of total failure of consideration: Cole v. Pope, 29 S. C. R. 291; but otherwise the law as stated is the law as it is still declared. To the same effect is the decision in Thomas v. Powell, 2 Cox Eq. 394; Miller v. Pridden, 6 Jur. N. S. 78; Kincaid v. Kincaid, 6 P. R. 93; and Re Buck, Peck v. Buck, 6 P. R. 98.

The first case I have seen in which compensation after conveyance was allowed to be recovered was Cann v. Cann, 3 Sim. 447, decided in 1830. That was a case of sale by the Court in which one of the conditions of sale provided that if any error or mistake should appear in the description or measurement of the estate in the particulars, or any other error or mistake whatsoever should appear respecting the estate, such error or mistake should not annul the same, but compensation or an equivalent should be given or taken.

The particulars stated the estate to be in the occupation of tenants at £55 per year. After the purchase money had been paid, the conveyance executed, and the purchaser let into possession, he discovered that the rents were only £40 per annum, and he presented a petition for compensation. The Vice-Chancellor held that the purchaser's right to compensation was in no way affected by the circumstances of his having accepted a conveyance. This case was followed by the Exchequer Chamber in Bos v. Helsham, L. R. 2 Ex. 72, in 1866. In 1878 Vice-Chancellor Malins attempted to restore the law to what it was understood to be prior to Cann v. Cann, and in Manson v. Thacker, 7 Ch. D. 620, he refused to follow Bos v. Helsham, and held that the condition as to compensation applied only to errors discovered before completion of the purchase, and that there could be no recovery afterwards, except in a case of fraud. To the same effect is the language used by the same learned Judge in Besley v. Besley, 9 Ch. D. 103, although on the facts of that case his judgment was in a later case approved by the Court of Appeal.

Then came In re Turner and Skelton, 13 Ch. D. 130, where Jessel, M.R., adopted and followed the decisions in Cann v. Cann and Bos v. Helsham, and refused to follow the decision of Malins, V.-C., in Manson v. Thacker. That was in 1879, and in the same year, but a few months later, Malins, V.-C., reiterated the position taken by him in his two previous decisions, in Allen v. Richardson, 13 Ch. D. 529.

The already unsatisfactory condition of the authorities was further complicated by the elaborate judgment of Williams, J., in Joliffe v. Baker, 11 Q. B. D. 255, in 1883. In that case the vendor of real estate, during the negotiations, made a representation to the purchaser, bona fide believing it to be true, that the pieces of land sold contained 3 acres, whereas, in truth, they contained only slightly over 2¼ acres. After the completion of the contract and execution of the conveyance, the purchaser sought to recover compensation for the deficiency, on the ground of fraudulent representation. There was no condition for compensation for errors as in Cann v. Cann and Bos v. Helsham, and the trial Judge had found against the allegation of fraud. Williams, J., held that the plaintiff was without relief, a result in which A. L. Smith, J., concurred, but the language of the former went much farther than was necessary for the actual decision of

the case. He approved of the judgments in Manson v. Thacker, Besley v. Besley, and Allen v. Richardson, explained Cann v. Cann and Bos v. Helsham, and disagreed with the judgment of the Master of the Rolls in In re Turner and Skelton. He finally, at pp. 268 and 269, summed up his understanding of the law in the following language: "I am further of opinion, secondly, that, after the purchaser has taken a conveyance and the purchase money has been paid, no action can be maintained, either at law or in equity, for damages or compensation on account of errors as to quantity or quality of the subject matter of the sale, unless such error amounts to a breach of some contract or warranty, contained in the conveyance itself, or unless some fraud or deceit has been practised upon the purchaser."

I am not aware that the actual decision in Joliffe v. Baker has ever been questioned, but in Palmer v. Johnston, 13 Q. B. D. 351, the Court of Appeal did dissent from the law as laid down by Williams, J., in that case, in so far as his judgment conflicted with Cann v. Cann and Bos v. Helsham. By the judgment of the Court of Appeal in Palmer v. Johnston, Cann v. Cann and Bos v. Helsham were finally declared to be good law, largely on the ground that these two cases are decisions on the law as to matters which come in the daily transactions of life, and, after such a great lapse of time, should not be overruled, whether they are right or wrong. At the same time Manson v. Thacker and Allen v. Richardson were overruled. Besley v. Besley was also disapproved of in Palmer v. Johnston, but in a later case of Clayton v. Leech, 41 Ch. D. 103, the Court of Appeal held that Besley v. Besley was not overruled, and followed it; and Cotton, L.J., expressed the same opinion as to Allen v. Richardson.

Up to this time (1889) the decisions of the Courts had been very contradictory and unsatisfactory, but since that time they have been uniform, and certain principles of law have been recognised and acted upon. It is settled, I think, that, in the absence of fraud, a covenant in the conveyance which has been broken, some express provision for compensation in the original contract that has not become merged in the conveyance, or some warranty, the purchaser, after conveyance and payment of his purchase money, has no remedy either at law or in equity.

In the present case there is no covenant, and it is admitted that the transaction is free from fraud. It was argued that the transfers were handed over subject to a verbal condition that the amount of the incumbrances should be subsequently ascertained and adjusted. The Master does not state on what he bases his finding that the plaintiff is entitled to recover the excess of incumbrances over $5,500. I am, therefore, unable to say whether or not he found in favour of the existence of such verbal condition. A perusal of the depositions taken before him, however, satisfies me that there was no evidence that could reasonably support an affirmative finding on that subject.

It is quite clear that there is no provision in the contract at all equivalent to the condition relied upon in Cann v. Cann, Bos v. Helsham, In re Turner and Skelton, and Palmer v. Johnston. Does the statement in the agreement as to the $5,500 incumbrance on the land amount to a warranty that the sum named is the total amount of the incumbrances? If it does, relief by way of damages for breach of such warranty can be had; De Lassalle v. Guildford, [1901] 2 K. B. 215. In that case the warranty relied upon was an express one, but there is no such warranty in this case, and, in my opinion, none can be implied. The statement as to the amount of the incumbrances on the land in this case is nothing like as positive as the statement as to the quantity of the land agreed to be sold in Joliffe v. Baker, in which relief was refused.

In my opinion, therefore, the plaintiff has made no case for the recovery of the sum of $950 from the defendant.

The report of the Master will be varied by disallowing the item of $950 found by him to be payable by the defendant to the plaintiff, and by reducing the amount by which he found the plaintiff entitled to a vendor's lien by that sum.

The defendant is entitled to the costs of appeal.

BRITISH COLUMBIA.

MARTIN, J. OCTOBER 24TH, 1909.

CHAMBERS.

RE DARNLEY AND CANADIAN PACIFIC R. W. CO.

Costs—Workmen's Compensation Act, 1902—Case Stated by Arbitrator—Costs of—Jurisdiction.

In this proceeding under the Workmen's Compensation Act, 1902, the late G. F. CANE, Co.C.J., was appointed arbitrator by order of CLEMENT, J., and made an award in favour of Darnley, the applicant, for $140. During the arbitration proceedings two points were raised upon which the respondents, the railway company, contended that the applicant could not recover: (a) that he had misrepresented his age at the time of entering into employment; and (b) that, after injuries received, he had signed a receipt for $21 as a release. CANE, Co.C.J., decided that these two facts disentitled the applicant to recover, but reserved a special case for the opinion of a Supreme Court Judge, pursuant to sec. 4 of the second schedule to the Workmen's Compensation Act, 1902, and MARTIN, J., answered the questions submitted to him in the negative: see 14 B. C. R. 15, 9 W. L. R. 20.

After MARTIN, J., had answered the questions submitted to him in the negative, and before his memorandum and the arbitrator's finding were duly recorded, CANE, Co.C.J., died. Thereupon the applicant applied to GRANT, Co.C.J., and the memorandum was duly recorded; the effect of which, under the Rules and the Act, was that the award might be enforced, as a County Court judgment. In the memorandum of MARTIN, J., no mention was made of the costs of the special case.

The applicant then moved before MARTIN, J., for an order directing the registrar to tax the costs of the special case to the applicant, and for a fiat for an increased counsel fee.

R. C. Lowe, for the applicant, referred to Fritz v. Hobson, 49 L. J., Ch. 735; Attorney-General v. Lonsdale, 40 L. J. Ch. 198; Viney v. Chaplin, 3 De G. & J. 282; In re Knight and

Tabernacle Society, 62 L. J. Q. B. 33; Rules 34 and 81 of the Workmen's Compensation Rules; In re Gonty and Manchester R. W. Co., 65 L. J. Q. B. 631.

H. G. Lawson, for the respondents, contended that the arbitrator should deal with the costs of the special case, and that the learned Judge had no jurisdiction.

MARTIN, J., held that he had jurisdiction over these costs, and made an order directing the registrar to tax to the applicant the costs of the special case.

BRITISH COLUMBIA.

OCTOBER 30TH, 1909.

FULL COURT.

BARNES v. BRITISH COLUMBIA COPPER CO.

Master and Servant—Injury to Servant—Electric Tramway —Dangerous Work—Knowledge of—Structural Defect—Risk Voluntarily Incurred — Negligence — Contributory Negligence.

Action for damages for injuries sustained by plaintiff whilst engaged as a switchman on defendants' electric motor tramway between their ore bins and smelter furnaces. The plaintiff, having crossed the track to set the switch for the motor, which was about to return from the furnaces, started back over the track in order to take his usual seat on the head end of the motor, and got his foot caught in a hole in the floor between the rails. He shouted to the motorman, who immediately cut off the current and applied the brakes, but the motor did not stop quickly enough to prevent the accident, and ran upon the plaintiff, breaking his leg in 3 places. The hole had been there for some time previous to the accident; the accident occurred just before daybreak; and the plaintiff had not been at work for more than one shift. There was some suggestion in the evidence that the hole was left there for the purpose of making room for a bar connecting the two rails in the track.

The action was tried before IRVING, J., without a jury.

At the close of the plaintiff's case, the defendants moved for a nonsuit, and submitted no evidence.

Lennie and Hallett, for the defendants.

S. S. Taylor, K.C., for the plaintiff.

IRVING, J.:—I have reached the conclusion that the defendants have been guilty of negligence, and that the plaintiff is entitled to damages.

The hole in which this unfortunate man placed his foot was originally covered by a bar connecting the two rails. This bar was removed, why I do not know, but the hole was not filled up or guarded, although it had been visible to the motorman for some weeks. In these circumstances, I think knowledge of the defects, or neglect of duty to know of the defect, should be imputed to the defendants. The continued omission to mend this manifest defect would justify a jury in inferring that the employer was guilty of negligence according to the common law in one of two ways; either by neglecting to take reasonable precautions for the workman's safety, or by omitting to provide a proper system of superintendence or inspection, which system, had it been in existence, would have resulted in the mending of this trap.

It must be remembered that the hole was in between the tracks, and extending from one rail to the other, opposite a switch, and so almost in the very spot where the brakesman was bound to go in regaining his seat on the motor after operating that switch.

I find that the plaintiff did not contribute to the accident. Nor can the defendant escape on the ground that the motorman was in fault. I can see nothing wrong with the way these two men performed their duties.

The evidence establishes that the brakes on the motor would not work. This was the result of their being worn down by work. Having regard to the complaints made by Turner, knowledge of this defect also must be imputed to the defendants.

The damages I fix at $4,500.

Defendants appealed to the full Court, and their appeal was heard by HUNTER, C.J., MORRISON and CLEMENT, JJ.

Davis, K.C., for defendants.

S. S. Taylor, K.C., for plaintiff.

MORRISON, J.:—The master is charged with the duty, not only of having a proper system adequately protecting his workmen, but charged also with the further duty of seeing that that system is properly adhered to. I adopt the words of Killam, J., in Canada Woollen Mills v. Traplin, 35 S. C. R. 424, at p. 451: "It seems to me to be clearly established that the duty of an employer is not satisfied by the installation of a sufficient set of appliances and the adoption of a sufficient system of working, leaving them to managers or superintendents of apparently sufficient skill to manage or operate. Some responsibility remains in the employer. And, while the onus was upon the injured workman, at common law, to shew negligence in the employer himself, it might be discharged by evidence of circumstances raising an inference either of knowledge of the defects or of neglect of the duty to exercise care to acquire such knowledge and remedy them." The common law duty is succinctly enunciated by Lord Herschell in Smith v. Baker, [1891] A. C. 325: "An employer is bound at common law to so carry on his business as not to expose his workmen to unreasonable risks." It is not enough that proper animate agencies in the form of carpenters and motor drivers should be employed by the defendants at this part of the business, and that there must be sufficient of them, but those agencies in workings of this nature must, in my opinion, be supplemented by proper and adequate inanimate agencies (in this case) in the shape of a workable motor engine and proper facilities for the workmen to perform their assigned duties. Before an employer can avoid responsibility for the consequence of the improper discharge of their duties, without his knowledge, by the employees assigned to maintain his system of carrying on his works and keeping them in repair, he must, at his peril, do nothing or refrain from doing anything which may hamper not only those employees from performing their duties, but he must not limit the opportunity of the workmen from observing how those other employees are carrying out their assigned duties. Had this track been properly lighted, it may have been that the plaintiff would have brought the condition of the track to the notice of the defendants, when no doubt it would have been repaired, and, if it were not, and he received injury without any contribu-

tory negligence, then he would not be deprived of his remedy against his employer. In this case, the motor driver may have been absolutely competent, but the employer placed a defective motor at his disposal. The carpenter, no doubt, was a master mechanic in his particular line, but he was circumscribed as to the scope of his work and as to the time in which to perform it. The plaintiff was on night shift.

There is no evidence that there was an inspection of the track during the night. The floor of the track was just as liable to be broken by ore falling through at night as in day time. There was, therefore, half the period of the working day in which there was no protection to the plaintiff as against holes in the track along which he worked. Can that state of affairs be said to constitute an adequate system for the proper protection of workmen, behind which an employer may shelter himself from liability? I submit not. I think the learned trial Judge was right in drawing inferences of fact and in the inferences of fact which he drew from the evidence. I would dismiss the appeal with costs.

HUNTER, C.J.:—I concur in the dismissal of the appeal.

CLEMENT, J.:—Mr. Davis, for the defendants, conceded that if the hole in the floor in which the plaintiff's foot was caught was a structural defect, this appeal must fail; but he strenuously argued that the learned trial Judge had found to the contrary. What my brother Irving says upon this point is this: "The hole in which this unfortunate man placed his foot was originally covered by a bar connecting the two rails. This bar was removed, why I do not know, but the hole was not filled up or guarded, although it had been visible to the motormen for some weeks;" and he afterwards speaks of it as a manifest defect. I cannot see how this can be treated as a finding that the condition of things in connection with this hole was not in the nature of a structural defect. However that may be, this is a case in which the evidence upon the point in question consists of a few sentences in the evidence of a witness whose testimony was taken upon commission, and as to which, therefore, we are in the same position as was the learned trial Judge. Kean's testimony (also taken upon commission) to the effect that the hole in question had been caused by "a rock or something" falling from the cars and breaking the planking, was evidently and properly discarded, and, apart from this piece of evidence, the facts seem clear

enough. At the time the plaintiff was hurt there was in the planking a clean cut aperture, 3½ or 4 inches wide, extending across the space between the rails, and "there had been holes bored in a couple of pieces of iron as though there had been an iron bar there one time." It was in this aperture that the plaintiff's foot caught. My brother Irving drew the inference that there had been such an iron bar there at the time, and that for some unknown reason it had been removed. I must confess that it seems to me that one might just as plausibly draw the inference that the connecting rod had never been put in; that for some reason it never became or was deemed necessary to put it in. But, however that may be, when we have it in evidence that this state of things had long existed, and that no step had been taken to alter it, although there was a repair staff to look after the planking and the tracks, the proper inference, to my mind, is, that it was deliberately left as it was as a permanent structural condition. We should not, in my opinion, draw the other inference that it was a condition which was allowed to continue through the negligence of the repair staff. If the connecting bar which would cover the hole was never put in, there would, I think, be no question. If put in and afterwards taken out and left out for a long time, we ought not to assume either a wrongful or accidental removal or a negligent omission to replace, but rather an intentional creation and maintenance of the status quo. The condition of things on its face points to a structural defect, and the defendants were content to leave the evidence in that shape.

I would dismiss the appeal.

ALBERTA.

STUART, J. SEPTEMBER, 1909.

CHAMBERS.

RE RICHELIEU HOTEL LICENSE.

Liquor Licenses—Cancellation of License—Order of Court—Appeal to Supreme Court of Canada—Perfecting Security—Effect on License—Application for Renewal—Necessity for Recommendation.

Application to cancel the hotel license of one Alphonse St. Hilaire at Brosseau, on the ground that it was obtained without the required recommendation.

The license which expired on the 30th June, 1908, was cancelled by the Court en banc, and the licensee then appealed to the Supreme Court of Canada.

C. A. Grant, for the applicant.

Louis Madore, for St. Hilaire, contended that, by the Supreme Court Act, upon perfecting the security on appeal to the Supreme Court of Canada, the order cancelling the license was stayed, and that, therefore, he was an existing licensee and was entitled to a new license without a recommendation.

STUART, J.:—The license will be cancelled. I proceed upon the simple ground that the material before me shews that the order of the Court en banc cancelling the former license was issued on 29th March, 1909. The security upon the appeal to the Supreme Court of Canada was not perfected until 19th April, 1909. The effect of the order of the 29th March was that the license was cancelled. Upon the issue of that order the license, in my view, ceased to exist, because there was no further act required to be done by any person or any authority in order to carry out the order of the Court. That order in itself destroyed the license. I am, therefore, quite unable to see how the perfecting of the security can amount to a revival or restoration of that license or to the issue of a new one. There was therefore, in my opinion, no license in existence when St. Hilaire applied for his renewal. He should, therefore, have obtained the recommendation required in the case of an application for a new license as distinguished from the renewal of an old one. The applicant will have his costs of the application.

ALBERTA.

BECK, J. SEPTEMBER, 1909.

CHAMBERS.

SAUNDERS AND MARSHALL v. TOMLINSON.

Parties—Action by Joint Contractees—Action Begun without the Authority of one—Indemnity against Costs—Practice —Stay of Proceedings—Application to Dismiss—Costs of.

Application by the plaintiff Marshall for an order that "this action do stand dismissed in so far as he is concerned,"

on the ground that the action was commenced without his authority.

John Cormack, for the applicant.

G. B. O'Connor, for the plaintiff Saunders.

BECK, J.:—The action was in fact commenced without the plaintiff Marshall's authority. It is one to recover the down payment made by one Price, the purchaser, to the defendant, the vendor, under an agreement made between them, the plaintiffs being the assignees of Price, and alleging a refusal on the part of the defendant to convey.

Where there is only a joint right of action on contract, and one of the joint contractees wishes to sue, and the other refuses to join, the former has, in my opinion, two courses open to him, either (1) to join his co-contractee as a party plaintiff, or (2) make him a party defendant, alleging his refusal to consent to become a co-plaintiff. The first course can be adopted because the right of action is joint only. If it is adopted, the co-contractee so joined without his consent may apply to stay the proceedings until he is indemnified against costs in the action. The fact of his having or not having been offered indemnity before action would, of course, affect the question of the costs of the application. See Cullen v. Knowles, [1898] 2 Q. B. 380; Re Mathews, [1905] 2 Ch. 460; Seal v. Kingston, 24 Times L. R. 650.

I cannot follow the first mentioned case in holding that the words of Eng. O. 16, r. 11, "No person shall be added as a plaintiff . . . without his consent in writing thereto," apply in such a case. namely, the case where the right of action is joint only, and the co-contractee is joined originally as a co-plaintiff without his consent. I do not think he is in that case added as a plaintiff, and the whole Rule, to my mind, has reference to the adding — or striking out — of parties, in the case of misjoinder or in a wide sense non-joinder of parties in an action already commenced. Under the Rule in question, if it becomes necessary that a co-contractee should be made a party, the plaintiff is driven, unless the co-contractee consents in writing to be added as a co-plaintiff, to accept an order making him a co-defendant.

The words quoted do not however appear in our corresponding Rule 35, and I therefore think that portion of the English Rule is not in force in this jurisdiction.

In the present case I think the proper order is that all proceedings be stayed until the plaintiff Saunders indemnifies the plaintiff Marshall against all costs he may incur in the action, to the satisfaction of the clerk.

As it does not appear that indemnity was offered before the commencement of proceedings, I think the plaintiff Marshall is entitled to his costs of this application.

ALBERTA.

BECK, J. OCTOBER, 1909.

CHAMBERS.

WILSON v. GALLAGHER.

Parties—Substitution of Defendants—Mistake as to Identity —Costs.

Application by the plaintiffs for leave to amend the proceedings by substituting as defendants the Gallagher-Hull Meat and Packing Company Limited for the defendants described in the style of cause as "Cornelius Gallagher, doing business under the firm name and style of Gallagher & Hull, and Gallagher & Hull."

J. R. Boyle, for the plaintiffs.

J. E. Wallbridge, for the defendants.

BECK, J.:—The action is one for damages to the persons of the plaintiffs, husband and wife, by reason of negligence in the driving of an automobile by a servant of the defendants.

An affidavit filed on behalf of the plaintiffs shewed that the plaintiffs' solicitor was not aware that the business in connection with which the automobile was used was that of the Gallagher-Hull Meat and Packing Company Limited until the defendant Cornelius Gallagher was examined by him for discovery. It appears that Cornelius Gallagher is the manager of the business, and, had the company been sued, is the representative of the company upon whom the writ would naturally and properly have been served.

In the circumstances, I think it is proper to make the order asked for.

I was referred by the defendants' counsel to Raleigh v. Goschen, [1898] 1 Ch. 81. That case, however, confirms me in my first impression that I should grant the order. The order will, therefore, go, giving the plaintiffs leave to amend within 5 days by substituting for the present defendants the Gallagher-Hull Meat and Packing Company; the substituted defendants to have 5 days from service of the amended writ and statement of claim to enter an appearance, and to have liberty to amend the defence already filed by substituting their names as defendants, delivery of a copy of the defence being, in that event, dispensed with. The costs of this application and all costs in excess of the costs which would have been incurred had the substituted defendants been made defendants originally, to be paid by the plaintiffs to the parties made defendants originally, forthwith after taxation, but taxation is not to take place until after the action is at issue between the plaintiffs and the substituted defendants, or until further order.

Were I to refuse the present application, the plaintiffs would have to pay all the costs incurred in the action, being at liberty, of course, to bring a new action against the Gallagher-Hull Meat and Packing Company. I grant the application because I think a considerable amount of costs will thereby be saved.

ALBERTA.

BECK, J. OCTOBER, 1909.

CHAMBERS.

UNION INVESTMENT CO. v. PERRAS.

Evidence — Foreign Commission — Examination abroad of Officers of Plaintiffs as Witnesses on their Behalf — Refusal of Order—Fraud — Necessity for Examination of Witnesses in Open Court.

Application by plaintiffs for an order to examine officers of their company, out of the jurisdiction, as witnesses.

BECK, J.:—I come to the conclusion that I ought to refuse the application. The cases cited in Harris-Williams and Macklin's "Evidence on Commission," p. 23, and Holmested & Langton's Judicature Act, 3rd ed., pp. 718 et seq., shew that the granting or refusing of such an order is a matter of discretion, and instances are given in which similar applications have been refused.

This action is brought to recover the amount of 3 promissory notes made by the defendants to McLaughlin Bros. for the price of a stallion.

Action was brought in respect of the first of the 3 notes in the name of the Merriam Park Bank as indorsees. The defendants set up that there was fraud on the part of McLaughlin Bros.' agents in obtaining the note, and that the plaintiffs were not holders in due course. The sole "owner" of the plaintiff company and one of the McLaughlins were examined under order out of the jurisdiction for the purpose of shewing that the plaintiffs were holders in due course. The defendants established the fraud, and judgment was given in their favour. A sum of money had been deposited as security for the defendants' costs. This amount falling short, the balance was paid by a cheque, not of the plaintiffs, but of McLaughlin Bros.

The second of the 3 notes was sued in the name of one Peters. The same defences were set up. An order was granted under which the plaintiff and other witnesses were examined out of the jurisdiction. The defendants succeeded at the trial and on appeal to the Court en banc. On appeal by the plaintiff to the Supreme Court of Canada this judgment was reversed: Peters v. Perras, 42 S. C. R. 244. The report states that "the majority of the Court were of the opinion that the Courts below were not justified, under the circumstances of the case, in refusing to accept the uncontradicted testimony of a witness (examined abroad under commission) as to particular facts, of which notice had not been given in the pleadings or otherwise, relating to circumstances relied upon as sustaining or pointing to the imputation of bad faith, and no opportunity (having been) afforded to the witness of explaining or qualifying the facts or conduct on which the attack upon his veracity or honesty was based."

It is practically impossible for counsel to instruct foreign counsel with such particularity as to enable him to cross-

examine a witness whose veracity and honesty are attacked (as they were in Peters v. Perras and as they certainly will be in the present case), in such a way as to avoid the application of the rule laid down by the Supreme Court of Canada.

In the present case the fraud in obtaining the note is admitted. The substantial question in issue is whether or not the plaintiffs are holders in due course. I am convinced that justice will not be attained unless the witnesses on behalf of the plaintiffs called to establish this issue are examined viva voce in open Court before the trial Judge.

It was urged on the plaintiffs' behalf that, the plaintiffs being a large financial company, and the evidence being such as must be drawn from entries in their books, it would obviously be so inconvenient for them to take the necessary books away from their office for the considerable time necessary to enable them to be used in evidence, that the result of refusing the order asked for would make it practically impossible for them to do so. This argument has, however, not the force which in some cases might properly be given to it.

The note sued upon is dated 27th April, 1903, payable 3 years after date. The indorsement to the plaintiffs must, therefore, be shewn to have been made before 1st May, 1906—nearly 3 years and a half ago. In a large financial institution such as the plaintiffs are represented to be, I should suppose that the books to which it would be necessary for the plaintiffs' witnesses to refer could without serious inconvenience be produced at the trial.

An order will go dismissing the plaintiffs' application with costs to the defendants in any event.

ALBERTA.

BECK, J. OCTOBER 9TH, 1909.

CHAMBERS.

McDOUGALL & SECORD v. INGLIS.

Money in Court — Right of Execution Creditors of Party Entitled—Practice — Stop Orders—Charging Orders — Equitable Execution—Orders Made before Payment into Court—Effect when Money Paid in — Creditors' Relief Ordinance—Payment to Sheriff.

Application by the plaintiffs to make absolute a charging order nisi.

C. B. F. Mount, for plaintiffs.

No one for defendant.

G. B. O'Connor, for Duncan McGibbon et al.

BECK, J.:—The plaintiffs recovered judgment in this action against the defendant for a sum in respect whereof some $400 odd remained unsatisfied.

In an action of York v. Inglis there was in Court $800 paid in as the down payment upon the purchase price of certain land sold in that action to one Edwin Auld for $8,000. Out of the total purchase price of $8,000 there was payable to the plaintiff York about $7,000, leaving a balance to which the defendant would be ultimately entitled of about $1,000.

On 10th August the plaintiffs McDougall & Secord obtained an order nisi whereby it was ordered that the defendant's interest in the moneys so standing as aforesaid, after payment thereout of the amount due to the said York . . shall and in the meantime do stand charged with the payment of the above mentioned amount due to the plaintiffs McDougall & Secord.

It was subsequent to the issue and lodgment and service of the charging order nisi that the $7,200 balance of the purchase money was paid into Court by Auld to the credit of the action of York v. Inglis.

Subsequent to its payment a charging order nisi was made in an action of McGibbon v. Inglis in which the plaintiffs had obtained judgment against the defendant for some $280 odd, charging "the sum of $800 in Court to the credit of" the action of York v. Inglis with the payment of the amount of the judgment of McGibbon et al. The sum mentioned in the order is $800, though I fancy $8,000 was intended. The plaintiffs McGibbon et al. had, it is stated in an affidavit filed, previously obtained a stop order. It, however, is not produced.

The application before me is one on behalf of McDougall & Secord to make absolute the charging order nisi in their favour.

It is opposed on behalf of McGibbon et al., who take the objection that at the time the order nisi in favour of McDougall & Secord was granted there was no money in Court to which the defendant was entitled, inasmuch as the deposit of $800 was not sufficient to satisfy the claim of the plaintiff York; that in some events the plaintiff York might be

entitled to it; in others the purchaser Auld; but in no event the defendant, he being entitled only to the ultimate balance after the $7,200 was paid in; and that the portion of the purchase money not yet paid in could not be charged in advance by a charging order.

The argument was also made that, even if the charging order was effective, the Creditors' Relief Ordinance applied, and both charging orders should rank pro rata.

The Imperial Acts 1 & 2 Vict. ch. 110, secs. 14 and 15, and 3 & 4 Vict. ch. 82, sec. 1, mentioned in English Order 46, r. 1, do not apply to moneys in Court; but, nevertheless, a charging order can be made against moneys in Court under the general jurisdiction of the Court (Brereton v. Edwards, 21 Q. B. D. 488), and such an order amounts to equitable execution: ib.

Though I find no decision directly upon the point, it seems to me that it is "just and convenient" that the ultimate interest of a defendant in the purchase price of his land sold under the direction of the Court should be liable to be taken by some form of equitable execution granted under the general jurisdiction of the Court, notwithstanding the contingency that, by reason of the plaintiff failing to make title, or by reason of the purchaser making default, the particular fund may never become available. Inasmuch as the fund was ordered to be paid into Court, and was therefore not payable to the defendant, a receiving order would be inappropriate, but I see no reason why the fund should not be charged in the terms of the charging order, although not then paid in, and I therefore should hold, if it were necessary, that the charging order nisi in the case of McDougall & Secord v. Inglis was effective to charge the ultimate though contingent interest of the defendant in the $8,000 purchase money.

In Shaw v. Hudson, 48 L. J. Ch. 689, it was held that an order could be made and one was accordingly made, whereby it was ordered that no part of the share of the defendant in a certain stated sum in Court to the credit of the action, or of any interest to be credited in respect thereof, or in a certain stated sum by a certain order ordered to be paid into Court to the credit of the action by the purchaser of the lands in question in the action, when so paid in, be paid out . . . without notice to the petitioners, who were judgment creditors of the defendant. Such an order is a "stop order," not a

charging order, and it was held that it was not necessary first to obtain a charging order.

That was a case where the defendant, the judgment debtor, was absolutely entitled to the property represented by the fund in question. I think a stop order obtained prior to the payment of the balance of the purchase money in the present case, purporting to cover that balance, would become effective upon its being paid in. I think the charging order of McDougall & Secord had at least all the effect of a stop order.

The combined effect of the decision in Re Bokstal, 17 P. R. 201, and Dawson v. Moffatt, 11 O. R. 484, is that, in view of a provision corresponding to the Creditors' Relief Ordinance, C. O. 1898 ch. 26, sec. 8, moneys standing in Court to the credit of an execution debtor in respect of which there are claims by execution creditors, should be paid to the sheriff for distribution in accordance with that Ordinance, and that stop orders do not operate to give any priority.

In the result, I have reached the conclusion that, in this jurisdiction, where execution creditors seek to realise from a fund in Court, a charging order is unnecessary and inappropriate; that the proper practice is to obtain only a stop order, and then to apply under the provision of the Creditors' Relief Ordinance for transfer of the fund to the sheriff.

The charging orders nisi have had the same effect as stop orders; they need not, however, be made absolute. The order I make is that the fund in question, after each of the plaintiffs McDougall & Secord and McGibbon et al. have been paid costs of a stop order only, be transferred to the sheriff for distribution under the Ordinance.

ALBERTA.

HARVEY, J. OCTOBER 16TH, 1909.

CHAMBERS.

EDINGER v. McDOUGALL AND YORK.

Parties—Joinder of Defendants—Rule 29—Cause of Action—Separate Torts—Negligence — Pleading — No Allegation of Joint Cause of Action—Review of English and Ontario Decisions.

Application by the defendant York for an order requiring the plaintiffs to elect against which of the defendants they would continue the action.

O. M. Biggar, for defendant York.

C. F. Newell, for defendant McDougall.

C. C. McCaul, K.C., and E. S. McQuaid, for plaintiffs.

HARVEY, J.:—The statement of claim is as follows:—

"1. The plaintiffs are husband and wife.

"2. On the 19th day of May, 1909, the plaintiff Arvada Edinger was driving with the plaintiffs' infant child with a horse and buggy upon a public highway in the city of Edmonton, when her horse was, owing to the illegal and wrongful conduct of and the negligence and carelessness of the defendants, and each of them, frightened and caused to run away, with the result that the said Arvada Edinger and the plaintiffs' infant child were thrown out and both of them severely injured.

"3. The particulars of such illegal and wrongful conduct and of such carelessness and negligence are as follows:—

"(*a*) Each of the defendants, at the time of such accident, was operating a dangerous machine, viz., an automobile or motor car, upon the said highway, following the same direction to that in which the plaintiff Arvada Edinger was driving, the defendants being in company, and one machine closely following the other at or about the same rate of speed; but both of them travelling at a rate of speed calculated or likely to frighten horses or other animals on the highway.

"(*b*) On approaching the horse and buggy of the plaintiff Arvada Edinger, it became and was the duty of the de-

fendants and each of them, owing to the nature of the machines operated by them, to take special precautions to avoid frightening the horse and to reduce the speed of the said machines to a minimum, and either not to attempt to pass the plaintiff's horse at all, or only to do so when the said plaintiff had entire control of the horse, and then only with extreme care and caution.

" (c) The said defendants, and each of them, with great noise of horns, bustle and speed, drove the said machine past the said plaintiff's horse; the defendant J. C. McDougall with his said machine first so passing the plaintiff, causing the horse to become frightened, restive, and beyond the said plaintiff's control; closely followed by the defendant Lorne York with his said machine further frightening and disturbing the said horse, and causing it to escape entirely from the plaintiff's control, run away, and cause the injuries complained of.

" (*d*) At the time of passing the plaintiff's horse, etc. (as mentioned), each of the said machines was being operated at an illegal rate of speed.

" 1. Each of the said machines was being driven along the highway at a greater rate of speed than 8 miles per hour, contrary to by-law 193 of the city of Edmonton, passed on the 5th day of June, 1900.

" 2. Each of the said machines was being run upon the public highway in the city of Edmonton at a greater rate of speed than 10 miles per hour, contrary to 6 Edw. VII. ch. 26, sec. 6 (Alta.)

" 4. By reason of the injuries to his wife and daughter mentioned in paragraph 2 hereof, the plaintiff O. J. Edinger has lost their services and society for a period of two months and has been put to expense for medical attendance, nursing, etc., and for repairs to the buggy.

" 5. The plaintiffs are in doubt whether they are entitled to damages against both, or only against one of the defendants, and if so which defendant."

Rule 29 provides for the joining of defendants, in the following terms: " All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly or severally or in the alternative." The Rule is one of the Rules of Order VI., which is intituled " Parties," and which corresponds in general terms with the Eng-

lish Order XVI., with the same title, Rule 29 being in the exact terms of Rule 4 of Order XVI.

The words of the Rule appear quite wide enough to authorise the joinder of the two defendants in this action, but in Smurthwaite v. Hannay, [1894] A. C. 494, and Sadler v. Great Western R. W. Co., [1896] A. C. 450, it was held that Order XVI. related only to the joinder of parties and not to the joinder of causes of action, and that consequently the wide terms of the Rule must be restricted in their application to a single cause of action.

In 1896, Rule 1, relating to the joinder of plaintiffs, was altered to make its application extend to the joinder of causes of actions to a limited extent, but no alteration has been made in Rule 4.

It follows then that, unless the cause of action against these defendants is joint, they should not be joined. One can easily see that looking at the case from the plaintiffs' point of view there would be considerable advantage in proceeding with the action against both defendants. It may very probably be that if either car had been alone, the accident and consequently the damage would not have resulted, and if that is the case there may possibly be some doubt whether either defendant, in an action against him alone, could be held liable. See Smith on Negligence, 2nd ed., p. 19: "Where the defendant's act and some other cause contribute with some degree of equality towards the production of the injury, it would be, as a matter of fact, a great difficulty to decide whether the defendant is liable." On the other hand, if the defendants were not acting in some way in combination, it is quite apparent that on a trial of the action before a jury either defendant might be materially prejudiced by evidence which would be admissible only as against his co-defendant. In my view, however, such considerations are not available, the only question being whether the Rule authorises the joinder, though I find it hard to avoid the conclusion that such considerations have prevailed in some of the reported cases, with the natural result of confusion and the distinguishing of cases which are indistinguishable in principle. In this way only can I explain the different conclusions reached by the same Court in Ontario in Quigley v. Waterloo Manufacturing Co. and Evans v. Jaffray, within two days of each other, and reported in 1 O. L. R. at p. 606 and p. 614 respectively.

It seems clear that, in the present action, the wrong or injuria done the plaintiffs by each defendant, or, in other words, the cause of action against him, is his own particular negligence, though there is only one damage, and though that damage may be due only to the combined negligence of the two. The statement that the defendants were in company does not, to my mind, constitute an allegation of combination or union between them, so as to make one in any way responsible for the act of the other. It seems to mean nothing more than that their machines were keeping close together, and, even if that were by agreement, there is no suggestion that the fact of keeping together was any of the wrong or negligence complained of.

I can see no distinction in principle between this case and Thompson v. London County Council, [1899] 1 Q. B. 840, decided by the Court of Appeal in England, and Hinds v. Town of Barrie, 6 O. L. R. 656, decided four years later by the Court of Appeal in Ontario, in which the English decisions are explicitly adopted. In the former case, at p. 844, Collins, L.J., says: "The damage is one thing and the injuria another; what constitutes the right of action is the injuria, the wrong done by a separate tort-feasor, and when we analyse this case we find we are dealing with it upon the assumption that the two acts which were done are entirely disconnected torts, quite distinct one from the other. The one was done recently . . . and the other at a much earlier date . . . and the joint result of these two independent torts has been that the plaintiff's house has come down. The damage is one, but the causes of action which have led to that damage are two, committed by two distinct personalities."

That case differs from the present in the fact that the injurious acts complained of were separated in time, but that is only one of the elements of separation, though it gives greater distinctness to the separation.

In Hinds v. Town of Barrie the plaintiff claimed against the defendants for their interference with a natural watercourse at different times and in different ways, the combined action of the two acts of interference causing damage to him. The learned Judge who heard the application to require the plaintiff to elect one defendant, refused the application, and the Divisional Court unanimously dismissed an appeal. On appeal to the Court of Appeal, however, that Court unanimously reversed the former decisions, holding that there were

two causes of action which could not be joined. In this case also the acts complained of were committed at different times, but this distinction, while, in my opinion, not affecting the principle, is in itself more superficial than real, because the real thing complained of, and giving the cause of action, is the interference with the plaintiff's rights, which is a continuing thing, and when the two come together the damage results, so that in reality the wrongs by each defendant are as much coincident in time as in the case under consideration.

I have hesitated to come to the conclusion I have by reason of the decision of the English Court of Appeal subsequent to all of the cases above referred to in Bullock v. London General Omnibus Co., [1907] 1 K. B. 264. In that case the plaintiff was injured in a collision between a 'bus of one defendant and a cart of the other defendant—the statement of claim alleging joint negligence and alternatively separate negligence, particulars being given of the acts of negligence complained of. No objection was made to the joinder, and the action went to trial, when judgment was given against one defendant and the action dismissed as against the other. An appeal was taken from the manner of disposing of the costs, the plaintiff being given the costs she had to pay the successful defendant as against the unsuccessful defendant. On the argument it was contended that the Judge had no jurisdiction to make the order, as the defendants were improperly joined. Collins, M.R., at p. 270, says: "It is much too late to complain of the irregularity, if there was one." Having decided this, his remarks as to the alleged irregularity might perhaps be considered as only obiter. He points out that there is an averment of a joint tort by both defendants and a separate charge of tort against each, and on this ground he distinguishes the case from the other cases. If there were any allegations of fact shewing that the defendants were acting in concert so as to make their negligence joint, then the case is quite different from the one under consideration, but, if not, and the report does not shew any such allegations, then it appears to me that the mere calling of the negligence joint should not be sufficient when the allegations shew that it means nothing more than "combined" or "united," which, as is pointed out in Hinds v. Town of Barrie, means no more than "concurrent." Cozens-Hardy, L.J., bases his judgment on this point on the fact that the amendment of the English Rule as to joinder of plain-

tiffs shews that the decisions that Order XVI. does not deal with joinder of causes of action are not now applicable. This appears perfectly obvious, but I am quite unable to see what bearing it has on the question of whether the Rule relating to the joinder of defendants deals with the joinder of causes of actions. There has been no decision before this, that I am aware of, since the House of Lords' decisions, that suggests that it does. It is quite clear, however, that, if he is right in basing his judgment on the amendment to the Rule, the decision is no authority for me, since our corresponding Rule has not been amended.

In view of the circumstances of that case and the reasons for the judgment, I have come to the conclusion that I should hardly be justified in accepting it as an authority in opposition to the cases I have referred to, and which, to my mind, clearly establish that the Rule does not permit the joining of these defendants. Coming to this conclusion, it is necessary to consider whether any effect can be given to the application of plaintiffs' counsel for leave to join them under Rule 32. Except as to procedure, this Rule is the same as English Rule 7 of Order XVI., and consequently, as decided in the House of Lords' cases cited above, does not relate to the joinder of causes of action, and, therefore, cannot be invoked in this instance.

The order, therefore, will go requiring the plaintiffs to elect against which of the two defendants they will continue the action. The costs of the application, as in Hinds v. Town of Barrie, will be costs in the cause as between the plaintiffs and the defendant York.

ALBERTA.

HARVEY, J. OCTOBER 19TH, 1909.

CHAMBERS.

FOX v. HUNTER.

Mortgage—Sale of Land under Direction of Court—Application of Plaintiff-mortgagee to Cancel — Upset Price Fixed too Low—Negligence of Mortgagee—Refusal of Application—Costs.

Application by the plaintiff-mortgagee to set aside a sale made on his application under direction of the Court. The

application was opposed by the purchaser, who had complied with the terms of his purchase, and who stated that he had incurred expense in respect of the land and otherwise by reason of the sale.

J. T. Collisson, for the plaintiff.

R. F. Murphy, for the purchaser.

HARVEY, J.:—The ground on which the application is made is that the Judge who fixed the upset price, by inadvertence made it too low. It is also intimated, though it is not shewn by proper evidence, that the mortgagee neglected to advertise the sale, as directed. The latter ground is a pure act of negligence on the part of the applicant, which it would be most improper to allow him to set up to the injury of the innocent purchaser. How it would have to be considered in an application to confirm the sale would be another matter, which I am not considering, but the mortgagor and not the mortgagee would be the one to be considered in respect of it.

As to the first ground, I find that the mortgagee's judgment is for $1,630.53, in addition to which he will be entitled to a further sum for subsequent interest and costs. There was a prior claim on the property amounting to about $435, which, under the terms of the sale, was to be paid off out of the purchase money. On the application for directions for the sale, the plaintiff-mortgagee brought in an affidavit putting the value of the property at $1,600 for a time sale, and $1,280 for a forced sale. Instead of fixing a reserve bid, the learned Judge apparently, having regard to this affidavit, set an upset price of $1,300. Under our practice, the mortgagee is entitled to have the reserve bid or upset price fixed at sufficient to cover his claim. It is quite apparent that the plaintiff did not ask the Judge to protect him in this way, or it would have been done. There is nothing to indicate whether this failure was deliberate or inadvertent, but the conditions were prepared, posters printed and posted by the plaintiff, all containing the amount of the upset price, and the sale held, and not until after all this and the payment of the amount required by the purchaser is any objection made. If it had been a reserve bid, which the plaintiff might be deemed not to know, and which, at any rate, would be sealed and out of view, there might be some merit in the application, though even in such a case a similar application was re-

fused in Re Jelly, 3 O. L. R. 72, but with an upset price the most favourable view for the plaintiff is that he has been grossly negligent. There may possibly be cases where relief might be granted from the consequences of such negligence on the part of the solicitors, but this does not appear to me to be such a case. The purchase price apparently is a fair value, and the purchaser is in no way at fault, and should be protected. Moreover, if the sale failed by reason of the neglect of the plaintiff, it seems quite probable that the purchaser would have a right of action for damages against the plaintiff, so that he might be really worse off than if he had the sale confirmed and completed.

The application will be dismissed with costs to be paid to the purchaser forthwith after taxation, which costs will be borne by the mortgagee personally, and will not be costs of the action.

ALBERTA.

HARVEY, J. OCTOBER 22ND, 1909.

TRIAL.

KEIZER v. KEIZER.

Husband and Wife—Alimony — Unsuccessful Action for—Costs of Plaintiff—Refusal to Order Payment by Defendant—Conduct of Action by Solicitors for Plaintiff.

Action for alimony, tried by HARVEY, J., without a jury, at Westaskiwin. The action was dismissed, and the plaintiff asked that the defendant be required to pay her costs.

R. W. Manley, for plaintiff.

J. E. Wallbridge, for defendant.

HARVEY, J.:—In Ontario for more than 20 years there has been a statutory provision prohibiting the granting of costs to the unsuccessful plaintiff in an alimony action beyond the amount of her actual and necessary cash disbursements. A similar provision exists in Manitoba. We have no such prohibition, and I am of opinion that it would be proper,

therefore, to follow the English practice in similar actions. There are numerous cases of comparatively recent date in which the subject is carefully considered, and, consequently, there is no necessity to consider earlier cases.

There appears no doubt that, like other cases of costs, it is a matter of judicial discretion, subject, of course, to certain general principles.

In Ash v. Ash, [1893] P. 222, Sir James Hannen, the President, considers the principles which ought to govern, and points out that a distinction is to be made between the case where the wife voluntarily brings an action and one in which she is a compulsory defendant at the instance of her husband, yet, inasmuch as, if she has no means of her own, a wronged wife cannot bring an action unless she can make her husband liable for costs, if her solicitors make proper inquiries and take all due care and act properly, they should be given their costs. In that case costs were allowed.

In two later cases, Kay v. Kay, [1904] P. 382, and Huntley-Gordon v. Huntley-Gordon (1908), 24 Times L. R. 806, the subject was again considered and costs were refused. Similarly in Thompson v. Thompson, 57 L. T. N. S. 374, costs were refused.

I am of opinion that I should not make any order for costs in this case. The solicitors' conduct is not impugned, but the only evidence I have of their precautions and inquiries is in the development of the case before me.

The statement of claim alleges various acts of cruelty and acts of adultery. No evidence whatever was given of the latter, and no corroboration of the plaintiff's own testimony was given of the former. The plaintiff was examined for discovery last June, and in that examination she admitted that a man to whom she had been married before she married the defendant was still alive, and, with the concurrence of her solicitors present at the examination, she refused to give any explanation to justify or shew the validity of her marriage to the defendant. On the facts, as presented by that examination, her cause of action would be defeated. At the trial she stated that the former marriage was invalid because the former husband had a wife living at the time she married him. I am not by any means clear that the existence of a valid marriage between the plaintiff and the defendant was sufficiently established to justify me in making any order against the defendant, but I do not refer to this fact for the

purpose of basing my refusal of costs on it, but rather as one of the matters indicating the facts which were before the solicitors and their conduct of the case. To my mind, if solicitors ask for costs in such an action against a successful defendant, it is not sufficient to shew that they have conducted the action as they would conduct any ordinary action, having regard only to the interest of their client and concealing any facts which might injure her. It is a hardship on the husband, who has been in no way at fault, to have to pay his own solicitors' costs of suit in order to prove that fact. He is also liable for interim disbursements which he has paid in this case, but, when it comes to imposing the further burden of the costs of his wife's solicitors, there ought to be grounds to shew that they have believed on reasonable and proper grounds that they were prosecuting a just cause. I do not desire to cast any reflection on the solicitors' conduct in this case. I simply say they acted as they would in any ordinary case, and that, I think, is not sufficient when they come and ask for costs against the successful defendant.

SASKATCHEWAN.

PRENDERGAST, J. OCTOBER 19TH, 1909.

TRIAL.

GAMBLE v. ARNOLD.

Contract — Supply of Work and Materials for Building — Architect's Certificate — Waiver — Promissory Note — Account—Items—Evidence.

The plaintiff, as assignee of the Kelly Plumbing Heating and Lighting Company Limited, brought this action on a promissory note for $529.50 and an itemised account for work done and materials supplied, for $554.59, both being for furnishings in the Wascana hotel, of which the defendants were the owners.

W. M. Martin, Regina, for the plaintiff.

C. E. D. Wood, Regina, for the defendants.

PRENDERGAST, J.:—I should first say that it has not been shewn at the trial that it was part of the agreement that no payment should be made except on production of a certificate from the architect. The architect's evidence does not go further than that he was to supervise the work, and it is plainly by mere inference from that fact that he adds that a

certificate was required. And, if my finding were different on that point, I should yet hold that the parties waived that condition by their conduct.

I also hold that the evidence of the materials having been supplied and the work performed is sufficient; and with reference to the matter of commission on the purchase of telephones and the boiler and tank, I am of opinion that the Kelly company are entitled to something in this respect.

These 3 questions being disposed of, the whole matter practically resolves itself into a taking of accounts.

I will first deal with the note, and, in doing so, with that part of the accounts the balance of which the note is supposed to represent.

I will start with statement exhibit 6, of 19th June, 1907, for $2,400.80, which the architect practically admitted having approved of except $52.94. Kelly says that he took this to L. A. Arnold, and that they agreed on a settlement for $1,060. The company's books (exhibit J.), bear that out pretty well. I am of opinion that, although it was subject to readjustment, that figure was agreed upon by both parties for the time being. This was on 3rd September, 1907. I find that this reduction from $2,400.80 to $1,060, was effected by allowing the defendants the following amounts: disallowed by architect, $52.95; cash by cheques, $700; freight and duty on telephones, $199.06; and amount paid Vulcan Ironworks,—in all, $1,277—which would reduce the account to $1,123.80. This is still $63.80 above $1,060, the amount which Kelly says was settled upon. There is no way of accounting for this difference, but, on Kelly's evidence and exhibit J., I will maintain the $1,060 as the amount agreed upon, even if the difference of $63.80 is not explained and may be a loss to the plaintiff.

For the $1,060 the defendants gave $200 in cash and a note for $860, which was renewed and reduced from time to time, until we come to the note sued upon, dated 12th December, 1907, for $529.50.

I have dealt with statement exhibit 6 for $2,400.80, as it is, in order to be able to trace down the account in the company's books. But the charges therein for telephones and freight and duty thereon, $669.95, are incorrect, and should be replaced by the actual cost of the telephones ($465), plus 10 per cent. commission, which I allow ($46.50), plus actual freight paid ($199.06)—in all, $701.56—a difference

of $40.60 to be added to the account. There is also to be added $25, which was missed by error in carrying the total from the statement book to the ledger. On the other hand, defendants, having supplied Kelly with the money to pay the telephones, should be credited with this amount, $465. The result of allowing these two further charges ($40.60 and $25), and allowing this further credit ($465), is to reduce by $399.39 the note sued upon ($529.50), leaving it at $130.11.

As to the $199.06 of freight and duty on the telephones for which the defendants also advanced the money, they were, as stated above, credited therewith in reduction of the account of $2,400.80 to the amount settled upon, $1,060.

I will now deal with the itemised account in the statement of claim, which is composed of 3 parts:—

First, connecting bar sinks, $168.68—I allow it all.

Second, supplying and fitting boiler and tank, $440.47—I allow it all, including the 10 per cent. commission; allowing however the defendants $5 to place a more substantial support under the boiler—which reduces the amount to $435.47. The defendants supplied the money to pay the Vulcan Iron Works for the boiler and tank ($325); but, as also above stated, they were duly credited with this amount in reducing the said account of $2,400.80 to $1,060.

Third, for various jobs, $322.58. I disallow $25.20 for covering steam pipe, which, according to the architect's evidence, came under the contract of Smith Brothers and Wilson—which reduces the amount to $297.38.

The statement of claim admits two credits for Canadian Fairbank notes, of $188.57 each, making $377.14.

The account stands thus:—

Due on the note ($130.11) with interest at 8% ($8.66).....		$138.77
Due on itemised account: 1st part.....	$168.68	
" " " 2nd part.....	435.47	
" " " 3rd part.....	297.38	
		901.53
In all		$1,040.30
Less credit, Canadian Fairbanks notes...		377.14
Leaving a balance due		$663.16

There will be judgment for the plaintiff for $663.16 and costs.

SASKATCHEWAN.

PRENDERGAST, J. OCTOBER 23RD, 1909.

TRIAL.

PIONEER FRUIT CO. v. LITSCHKE.

Sale of Goods—Action for Price—Absence of Contract—Conversion — Bailment — Injury to Goods—Liability of Bailee to Account—Costs.

Action for the conversion of a car of apples, valued at $487.50, or, in the alternative, for the price of goods sold and delivered.

D. Mundell, Moosomin, for the plaintiffs.

G. H. Barr, Regina, for the defendant.

PRENDERGAST, J.:—In September, 1908, the defendant put in with the plaintiffs an order for a car of apples, subject to the condition that he could cancel the order within a certain time.

On 1st October the plaintiffs, whose head office is at Brandon, Manitoba, wrote to A. Mallinson, their purchasing agent in Toronto, to ship a car of apples to the defendant at Halbrite, Saskatchewan.

On 7th October the defendant cancelled the order by letter to the plaintiffs at Brandon, and ordered another car from one Roberts.

By letter of 8th October to the defendant, the plaintiffs accepted the cancellation, and they wrote the same day to Mallinson to cancel the order. I think it is shewn that the car was not yet in consignment when Mallinson received this last letter.

On 31st October a car of apples, which in fact was shipped by the plaintiffs' agent in Ontario, arrived at Halbrite, consigned to the defendant. There was no invoice, and the shipping bill did not shew who was the consignor; so that the defendant, believing that the car was sent by Roberts, paid the freight, amounting to $184.39, and took possession of the car.

The defendant was retailing the apples, when, on 11th November, the second car came, and this one was in fact shipped by Roberts. The defendant also took possession of the second car, and says that he kept it separate from the balance of the first car.

On 26th November the plaintiffs wrote to the defendant enclosing invoice and advising him that they were drawing on him; and on 30th November the defendant replied as follows: "Halbrite, November 30th, 1908. The Pioneer Fruit Co., Brandon. Dear Sirs: We have your letter to hand re the car of apples you claim to have shipped to us, and in reply beg to state that this is the first we have heard re who these came from, and we wish to state that they are at your risk. We had a car coming from the east, and when these arrived we thought that they were ours, and so unloaded them, and as we cancelled the car from you. Our car arrived just a few days after your car, and we have them both in the cellar at the present time. The first car was the poor, miserable stock and made up of such poor varieties and badly mixed we cannot handle them; they are here for your inspection at any time. However, if you will sell those at right figure so we could sell them real cheap to the farmers, we might be able to handle them. Let us hear from you soon and oblige, Yours truly, Fred Litschke, Halbrite, per T. J. Jordan."

It appears that there was no market at Halbrite at that time for two cars of apples, so that the unsold part of the first car remained in the cellar. A considerable quantity seems to have decayed and was thrown away in the winter, and in April and May, which was after suit brought, the defendant sold all the remainder that were still merchantable.

The plaintiffs cannot succeed for goods sold and delivered, because there was no contract. Nor do I believe that this is a case of wrongful conversion; how could the plaintiffs call "wrongful" an act of the defendant which they courted and invited? I am of opinion that the relations between the parties are simply those of bailor and bailee. It was not shewn that the defendant as bailee did not take the usual and ordinary precautions. Of course he has to account. The statement of sales of the apples (exhibit 5) shews that, deducting therefrom the freight and other charges, there will remain only about $30—which I think is but a reasonable compensation for having handled the goods.

But, as just stated, the defendant should have accounted, which he has neglected and even refused to do up to the time of the suit.

For this reason, while the action will be dismissed, there will be no costs.

SASKATCHEWAN.

PRENDERGAST, J. OCTOBER 25TH, 1909.

TRIAL.

CITY OF REGINA v. GARRETT.

Payment—Purchase of Lots from City Corporation—Issue of Transfer—Receipt for Purchase Money—Issue of Fact as to whether Money Actually Paid—Evidence—Findings.

Action to recover $899.65 alleged to be the balance due on the purchase price of two lots in the city of Regina, together with interest.

F. W. G. Haultain, K.C., for the plaintiffs.

J. F. L. Embury, Regina, for the defendant.

PRENDERGAST, J.:—On 19th March, 1906, the plaintiffs, as vendors, and one Edwin Jackson, as purchaser, entered into an agreement for the sale of two lots, wherein the consideration is stated as $970, of which $240.50 is acknowledged received at the time of execution, and the balance to be paid in 3 instalments of $242.50 on 19th March of the years 1907, 1908, and 1909, with interest at 7 per cent.

On 17th May following, the said Edwin Jackson assigned to Bruce McInnis and W. W. McInnis his interest in the said agreement, the assignees agreeing to give their personal covenants to the plaintiff.

And on 2nd June the said Bruce McInnis and W. W. McInnis in turn assigned to the defendant their interest in the said agreement, the defendant likewise agreeing to give his personal covenant to the plaintiff.

At the end of November—on the 20th, as I find—the defendant went to the city treasurer's office, and there delivered up the agreement and the two assignments to have the latter

recognized and recorded, and at the time paid $4 as recording fee, for which he got a receipt. Being produced at the trial, each of the 3 documents was shewn to bear a certificate of the fact of its registration in the city books as of 23rd November, 1906, in each case signed by the city clerk; and in the property sales register of the city, opposite a description of the said lots and the name of Edwin Jackson as purchaser, the names first of Bruce and W. W. McInnis and next of the plaintiff appear in a column headed "assignee," and the date "November 23rd, 1906," in the column headed "assignment registered."

What happened from 23rd November, 1906, to the December following is really the matter in dispute in this case. But, be that as it may, in the beginning of December the defendant received a transfer of the said lot from the city to him, under cover of a letter from the city treasurer addressed to him, and dated 3rd December, in the following words: "Enclosed herewith find transfer of lots 3 and 8, block 424, city of Regina, to J. H. Garrett."

This transfer is dated 23rd November, 1906, and bears the words, following the consideration, "Receipt of which is hereby acknowledged."

I should here say that the city books do not seem to have an entry of any money having been paid with reference to the said lots, except the cash payment at the time of the execution of the original agreement and the $4 for the registration of the two assignments.

I perhaps have some doubts whether these books could properly be received in evidence. At all events, Mr. Fenton Munro, city treasurer since 1st April, 1906, swears that he did not receive from Garrett or any one else any money on the time payments, that he does not know that any money was so paid, and that he has been all along dealing with those lots as if such payments had not been made. He says that in March, 1907 and 1908, when the first and second time payments respectively became due, notices were sent to Garrett from his (the treasurer's) office calling upon him to pay the instalments in arrear, and advising him that the agreement was liable to be forfeited. His personal knowledge is, however, simply that batches of notices of that kind were sent on the said dates by his orders, and that there con-

sequently must have been one to Garrett in due course of the business of his office.

A written notice from the treasurer was produced, addressed to the defendant, dated 24th March, 1909, and claiming, with reference to lot 3, the whole of the 3 time payments, of which the last had just become due. On the evidence, the defendant may and may not have received the same. But it is fully established that a like notice with reference to the same arrears on lot 8, and of the same date, was sent to and received by one Graham, to whom the plaintiff had in the meantime sold that lot—a fact of which the treasurer was cognisant, through Graham's name appearing as the owner of it in the assessment roll for the current year.

Graham was surprised to hear that there was something still due to the city on his lot, and, after interviewing the defendant, at once went to the treasurer and represented to him, as the fact was, that the defendant had obtained a certificate of title under a transfer from the city for lots 3 and 8, and that he himself had a certificate of title under transfer from the defendant for lot 8.

The treasurer at once took the position that the defendant had not made the payments as alleged, and that the transfer to him had been issued by error, and this suit followed.

The explanation given on behalf of the city to account for this error is as follows. It was the course of business at the city offices that assignments of agreements for sale should be first presented by the holders at the treasurer's office. This was done whether the object were merely to have the assignment recognised and recorded, or whether the object were—after all payments on the lots were made—to have a transfer issued. The treasurer would receive at the same time either simply the recording fee or the balance of the purchase money, give a receipt therefor, and then hand the assignment over to the clerk with verbal instructions either to record the assignment or issue a transfer as the case might be. After recording the assignment and indorsing thereon a memorandum of the fact, or after causing a transfer to be prepared, the clerk's duty was to return the document (assignment or transfer), to the treasurer, who would then transmit it to the owner. The city's contention is that the defendant called only once at the treasurer's office, that is, on 20th November, 1906 (the date of receipt exhibit D.); that he went there with no

other object than to have the 3 documents recorded; that he then delivered the said documents with no other money than the $4; that there was a mistake either in the giving or the receiving of the directions from the treasurer to the clerk; that the latter, in consequence of this mistake, made out a transfer, instead of simply recording the assignment; and that the transfer, having been delivered over to the treasurer's office, as the usual course would be, was transmitted in error by the latter to the defendant. It is pointed out in this respect that the date of recording the assignments in the property sales account, as well as the date of the memorandum of registration on the same document, being 23rd November, 1906, is the same as the date of the transfer.

I should here say that I find as a fact that the transfer was transmitted to the defendant by the treasurer himself; the letter under cover of which it was so transmitted, and bearing his stamped signature, must have been dictated by him, as shewn by the typewritten initials in margin "F.M./C.B.," which I take to be for "Fenton Munro" and "Catherine Blair," the typewriter in the office.

The strongest feature of the defendant's case is, of course, that he holds the transfer, and that this document, moreover, bears an acknowledgment that the full purchase price of the lots was received.

The defendant swears that he went several times in the fall of 1906 to the city hall offices to ascertain the amount then due on the lots—which, I might remark, he could have found out by simply reading the agreement in his possession. Then he goes back to the city hall on 20th November, not, however, to pay the amount which he says he had then ascertained, but simply to have the two assignments recorded, and he at the same time pays the recording fee of $40. He swears that he returned to the city hall some time later, and paid there to somebody in the office between $700 and $800 in bills, as being the full amount due on the lots. He says this was on or about the last day in November, 1906, and on cross-examination swears it was after the 24th, but will not swear it was after the 25th. He is not quite sure whether he got a receipt or not. He does not know the name of the man to whom he paid the money, but states that he was apparently engaged in doing clerical work for the city, and he paid the money to him over the counter. He says that he got the $700 or $800 from his house, from different parts of his house,

that it was scattered, kept in drawers, and hidden, so to speak; that he took the exact amount due right from the house to the city office; that he had more than that amount in the house that day; and that he always kept money that way to speculate and for a "snap." He could not say exactly where he got this money from, nor how long he had had it in his house—but there were his wages, accumulating wages, and his wife kept boarders.

The defendant's wife says in evidence that they kept money in the house that they saved for such things as that in cases of emergency, and that they always set aside money when something was coming due, but would not say that they were saving that money for this payment—no, not precisely. She thinks there was about $700 in the house when the defendant left for the city hall; she did not see him take it, but it was no longer there after he left. She says her husband was about to leave on a trip to Edmonton, and that he stated that, as he had the money there, he might as well pay the balance due on the lots before he left.

It is, of course, very unusual to keep money in one's house that way, and to pay such large sums in bank bills. Nor could he say at all where the money came from. He states that he paid the money after 24th November; but how is it that the transfer is dated 23rd November, and it probably would take a day to prepare it? Further, according to his story he went to the city offices on 20th November, knowing the amount due on the lots, but handed the assignments in only that they should be recorded, and it was only 5 days after when he went back to make the payments. Moreover, in November, 1906, not one of the 3 time payments was due. That he has no receipt can be accounted for by the length of time which has since elapsed and the fact that he may have considered the same unimportant from the moment that he received the transfer. But, on the whole, this version of the defendant surely seems extraordinary in many aspects.

On the other hand, there are in the evidence tendered for the plaintiffs some unusual features which would seem to require an explanation, and yet remain unexplained.

First of all, there were 5 men working in the treasurer's office: the treasurer himself, 3 that were named at the trial, and another not named. The first 4 only, apparently, were authorised to receive money over the counter, and one of them would remain in at the lunch hour when the others were

away. Now, the treasurer gave evidence, but none of the others did, and the defence urged—rightly, I think—that this leaves open a wide range of possibilities.

Then, following the entries that I have mentioned in the property sales register, there are two not yet referred to, to the effect that the transfer issued to the defendant and that it so issued on 23rd November. 1906. Now, these last entries are correct entries. Whether the defendant was entitled to the transfer or not is another matter; but these entries state that a transfer was issued to the defendant, which was an actual fact that should be recorded, and as such the entries were properly made. It was not shewn who made these entries, nor does that matter, as they were properly made. But a red line was run through these entries with the evident intention of annulling them or scoring them off, and what I should like very much to know is: who scored them off, and when were they scored off? It was done by somebody in the office. If they were scored off for an honest purpose, it seems to me there could only be two reasons for doing this. First, the reason may have been the discovery that a transfer had issued by error with respect to these lots. But surely that honest official would have raised a cry; this was not a trifling matter; he would at all events have reported to the treasurer; but the treasurer swears that he became aware only in April, 1909, that a transfer had been issued. Secondly, it might also have been because it was thought, in consideration of the fact that the balance of the money nowhere appeared as paid, that no transfer had been issued in fact and that the entries had been made by mere clerical error. In that last case, I would ask: when was the erasure made? If made in 1906, the facts were yet fresh in the memory of the officials. The official who had made the entry would remember that the transfer had in fact issued. The others would presumably hesitate before scoring off an item of that importance; they probably would consult the treasurer, who would recollect having sent the transfer under cover of the letter that he himself dictated, as I have already found, and a copy of which was of record in the office. And, if the erasure was made in 1907 or 1908, how is it that the auditor did not see the plain entry that was there, that a transfer had issued, and, seeing it, did not call upon the treasurer to account for the 3 instalments the payment of which appeared nowhere?

I must say that the defendant's evidence is very shady and that I look upon it with great suspicion. The concordance of dates on the different instruments is also very strong against him. But it is possible, after all, that he should have kept money and paid out money in the very unusual way that he says, and his wife corroborates him in some degree as to this. That the date on which he says he paid the money is manifestly wrong, does not of itself disprove his case, and still less does it necessarily make him a perjurer. That the officials referred to did not give evidence, leaves the plaintiff's case open to many conjectures, and so do the entries last mentioned, as well with reference to their being put there as to their being scored off. And of course the defendant holds the transfer wherein the receipt of the money is acknowledged, which throws the onus on the plaintiffs.

With reluctance, and with some hesitation, I come to the conclusion that the plaintiffs have not established their case. The action will be dismissed with costs to the defendant.

SASKATCHEWAN.

PRENDERGAST, J. NOVEMBER 4TH, 1909.

TRIAL.

WIRTH v. COOK.

Vendor and Purchaser — Contract for Sale of Land — Inability of Vendor to make Title — Mistake — Right of Purchaser to Rescind — Return of Cash Deposit—Purchaser Taking Possession without License—Compensation for Improvements.

The defendant as vendor and the plaintiff as purchaser entered into a certain agreement for the sale of land, and the purchaser now brought this action for rescission, return of a cash payment of $260, and $420 damages for loss of improvements.

J. C. Secord, Regina, for the plaintiff.

J. F. L. Embury, Regina, for the defendant.

PRENDERGAST, J.:—The defendant, who was a real estate agent, had for sale, amongst other lands, the south-east quarter of section 16, township 20, range 19, west of the second prin-

cipal meridian, belonging to one Brice, together with a certain other quarter-section owned by the Bank of Montreal, and had commissioned the Capital Land Company to sell the same as sub-agents.

On 27th April, 1907, the plaintiff went to the company's office in the city of Regina, and, after inquiring about the terms and conditions at which they held the said south-east quarter of 16, which is near his homestead, was told that the price was $1,440, of which $260 was to be paid down, and the balance in certain instalments, which were then stated. The plaintiff then and there expressed his willingness to buy, paid $10, for which he got a receipt, and, having returned on 2nd May, paid $250, which completed the cash payment, and for which he also got a receipt. In these two receipts, the description of the south-east quarter, which was intended to be conveyed, is fully set out. This, as already stated, was Brice's quarter.

The company reported the sale to the defendant, referring to the quarter by description, and not under the owner's name, and handed him the cash payment of $260 which they had received.

J. M. Scott, the clerk in the employ of the company who effected the sale, received the money from the plaintiff, and handed it to the defendant, says that the plaintiff "was to get his agreement then," that "he was to get it that day," that "the defendant was supposed to prepare the agreement and get it ready."

The defendant, either through some mistake in his notes or error of memory, thought that the quarter-section reported to him as sold was the one that the Bank of Montreal had listed with him, and he consequently paid them the $260 and had an agreement prepared in which the land described was the bank's quarter-section.

The plaintiff, however, did not stay to execute the agreement that day, as he was to do, but went on the quarter-section he had intended to buy and described in the receipts, and broke, disked, and harrowed 60 acres of the same. He came back to execute the agreement about 5 or 6 weeks later, which would be about 12th June, and, upon production in the defendant's office of the agreement with the bank which the defendant had caused to be prepared, the error was discovered, and the plaintiff refused to sign.

I may state at once that the bank still have the $260. The defendant appears to have informed them that, a mistake having been made, he would take over the bargain; but the matter has apparently not yet been closed between them.

Upon discovering the mistake he had made, the defendant told the plaintiff that he in fact had for sale the south-east quarter he wanted, but that it was listed with him at $1,600, instead of $1,440, and that the conditions were somewhat different. The plaintiff, nevertheless, appears to have then expressed a willingness to pay $1,600 rather than lose the 60 acres of improvements he had made. The defendant at all events told him not to do any more breaking, and that he would in the meantime communicate with the owner to see if he could not adjust his terms so that they might be satisfactory.

The defendant accordingly went the next day to see Brice, who lived some 30 miles away. On the evidence of the plaintiff, of the defendant, and of Scott, I do not see that this could have been later than about 15th June. The defendant, however, having learned on the road that Brice was not at home, left word for him with one Ellis, living in that locality, and came back to the city. Brice's answer to Ellis, dated 24th August, was duly transmitted by the latter to the defendant, and must have reached him about 1st September. Brice's terms were, in short: $1,440, of which $250 was to be cash, $200 on 1st November of the same year, and the balance in 4 equal annual instalments, with interest at 6 per cent.

It does not appear why Brice, who apparently had received word from Cook about 15th June, was 2½ months before replying. It is at all events only natural that the plaintiff, who had paid $260, had been made to understand that there might be difficulty in procuring the land he wanted, and that, even then, he would probably have to pay $160 more for it, should have felt uneasy, as he says he did; and I believe, as he asserts, that in the course of these 2½ months he did go to see the defendant several times to get his paper, as he puts it. This is again the more likely, as Scott says that, when he made his cash payment, the understanding was that he was to get his agreement then.

I should here observe that the plaintiff is a German farmer of very little education, and that, as far as I can judge, although understanding some English on general topics, he

would probably confuse many of the expressions used in that language in a transaction of this kind.

After the receipt of Brice's answer, nothing of moment happened for about a month. Possibly the defendant was waiting for the plaintiff to come in.

In the first week of October the plaintiff did come in, and executed as purchaser an agreement for the said quarter of section 16, wherein, not Brice, but the defendant, is the vendor. The consideration is therein stated to be $1,600, and not $1,440, as was at first agreed upon by the Capital Land Company (see receipts); and it was also $1,440, and not $1,600, that Brice was asking. What I wish to point out is that the defendant raised the price of the land on the plaintiff, without that being at all required to secure the same from Brice, and that the difference would go, not to Brice, but to the defendant.

The agreement also contains the following clauses:—

"The vendor agrees to convey and assure or cause to be conveyed and assured to the purchaser a good and sufficient transfer in fee simple," etc.

"The vendor shall and will suffer and permit the said purchaser to occupy and enjoy the same until default be made in the payment of the said sums . . . subject nevertheless to impeachment for voluntary or permissive waste."

"The said vendor agrees to deliver up possession of the said land on or before the day of October, A.D. 1907."

"Provided that in default of payment . . . the vendor shall be at liberty to determine and put an end to this agreement . . . and to retain any sum or sums paid thereunder . . . in the following method, that is to say, by mailing in a registered package a notice signed by or on behalf of the vendor intimating an intention to determine this agreement, addressed to the purchaser at Kennell P. O. And at the end of twenty days from the time of mailing the same the said purchaser shall deliver up quiet and peaceable possession of the said lands. . . ."

It does not appear, even from the plaintiff's own testimony, that he was dissatisfied to enter into an agreement with the defendant. Nor does he say that he did not know that the defendant was only an agent. I will at the same time casually observe, even if this does not perhaps matter, that I do not see the reasons which called for the agreement being made that way. Even if the plaintiff was made to con-

sent, the fact remains that it gave him at the time no security on the land.

The plaintiff says that the defendant was to send him a duplicate of the agreement in 8 or 14 days. He is corroborated as to this by his wife, whose want of knowledge of English, I must say, detracts somewhat from her testimony, and also by one Keiser. The defendant, on the other hand, asserts that it was quite clearly understood that he was to keep the duplicate agreement until the second payment was made, and he is supported by the witness to the execution of that agreement, who was then a typewriter in his office. My conclusion is that the defendant did not consider that it was a matter that the plaintiff should be consulted about, that he just told him that it was to be so, and the plaintiff yielded, or at all events did not object at the moment.

I, however, see no reason why the defendant should have kept the agreements. He says: "No copy was given to the plaintiff on account of the previous mix-up, and on account of it being so close to the second payment of $260, and because of the peculiar position it would place me in if he did not make the second payment, and I did not want to take the risk of assuming $2,800 of liability." These are no reasons at all. What he calls "the previous mix-up" was his own blunder, with which the plaintiff had nothing to do, and he could not be placed in any "peculiar position" by the plaintiff defaulting later on in the second payment, if he (the defendant) had followed what was the reasonable and fair course—that is, bring the plaintiff and Brice together and close the matter between them as principals. There is no more significance in what he says about "assuming $2,800 of liability." If he assumes any liability with the Bank of Montreal, it will be to save himself from his own blunder, and the plaintiff never asked him to assume any liability with Brice.

Having, however, secured the agreement with the plaintiff, the defendant on 11th October, writes to Brice: "I have succeeded in getting my purchaser on an agreement for sale, and as soon as I secure the cash payment I will advise you."

Now this is not in accordance with the actual facts. The defendant had received from the plaintiff a cash payment of $260 at the beginning of May, which was 5 months before. He had, moreover, just bound the plaintiff to himself under the agreement. His duty at that moment, as I hold that the

implied covenant was that he should at least do, was to turn over the $260 to Brice and secure the land. But that was the last communication that the defendant ever had with Brice, and he never made the least attempt to secure the land.

Whether the understanding at the time was or was not that the defendant should keep the duplicate agreement, I find that the plaintiff came back after that several times, and again asked for his papers. On two occasions, upon being refused, he seems to have said that he was ready to take back his cash payment with compensation for the loss of his improvements, and I find that he, on the last occasion, intimated to the defendant that, having no assurance whatsoever in his possession, he would pay no more money on the bargain. This, I moreover find, was before 1st November, and he then abandoned the land, if he had not abandoned it before, which is somewhat uncertain under the evidence.

At all events, on 14th December, the defendant sent the plaintiff, by registered package addressed to Kennell P. O., a notice of cancellation, which the defendant says he never received.

With respect to compensation for loss of improvements, I do not think the plaintiff has any claim. I feel that if he had asked when he made the cash payment whether he could go on the land, the reply would have been in the affirmative. But the fact is that he did not so ask. He had entered into no agreement when the improvements were made, and the two receipts, not satisfying the Statute of Frauds, were not in any aspect a license for him to take possession.

On the question of rescission and the return of the $260, I am of opinion that he should succeed.

Counsel for the defendant laid much stress on the fact that the vendor under the agreement covenants not "to convey and assure," but "to convey and assure or cause to be conveyed and assured." This, I think, is establishing a distinction where there is no difference. In one case he covenants to convey it himself, in the other case to have it conveyed by another; but in both the obligation is that the land shall be conveyed and assured, and the undertaking that this shall be done is equally binding.

Possession was never delivered to the plaintiff under the agreement, and he never was but a trespasser on the land.

The defendant was a trustee under the agreement, and was bound as such, even if the plaintiff knew the condition

of affairs, at least to protect the trust. This he never did, nor ever attempted to do. There was, moreover, in my opinion, apart from any obligation resulting from the trust, as already stated, an implied undertaking on the part of the defendant to pay to Brice the $260 received from the plaintiff, which he has also neglected to do. That the defendant understood that to be his duty, is shewn by the fact that, when the cash payment was handed to him by the Capital Company, he turned it over to the Bank of Montreal, whom he then thought to be the owners.

I hold that the plaintiff's declaration to the defendant, on the occasion of their last interview, when, upon being refused any further assurance, he declared that he would make no further payments, was a rescission, preceded or followed at once, as it was, by abandonment of the land.

The defendant sent to the plaintiff on 14th December, a notice of cancellation based on his defaulting in the payment due 1st November. I have held that the plaintiff had already rescinded at that time. But, even if he had not, the plaintiff, who was aware that the defendant had not attempted and was not attempting to secure the slightest interest in the land, and who, moreover, had not a scrap of paper to rely on, was not bound to continue to make his payments, knowing that the first, which he had made 6 months before, had not yet been applied as it should have been.

I do not think that the present case is governed by the principles laid down in Flureau v. Thornhill, 96 Eng. Rep. 635, 2 W. Bl. 1078, Bayne v. Fothergill, L. R. 7 H. L. 158, qualifying the former, and Day v. Singleton, [1899] 2 Ch. 320, distinguishing the first two—and in all of which the question was, whether and when the purchaser is entitled to compensation for loss of his bargain, when the vendor cannot make title. No such compensation is asked for here, and this case is, moreover, obviously distinguishable in almost all of its main features.

Counsel for the plaintiff relied strongly on Forrer v. Nash, 35 Beav. 167, where the Master of the Rolls said: "I am of opinion that when a person sells property which he is not able to convey himself, nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say: 'I will have nothing to do with it.' The purchaser is not bound to wait to see whether the vendor can induce some third person who

has the power, to join in making a good title to the property sold."

I may observe that in the case just cited, the question was in respect to an executed contract ("when a person sells," etc.), while we have to do in this case with an executory contract. But I find that in two cases where the contract was executory, the decision in Forrer v. Nash was referred to as being applicable.

In Brewer v. Broadwood, 22 Ch. D. 105, a vendor contracted to sell to a purchaser an agreement for a lease, and the purchaser afterwards repudiated the contract. At the date of the agreement and of the repudiation, the agreement to lease was voidable at the will of a third party. This third party was not taking any steps to avoid the agreement to lease, and was even willing to confirm it, on certain conditions. It was nevertheless held that the purchaser was entitled to repudiate the contract. Fry, J., in the course of his judgment, after citing the above quotation from Forrer v. Nash, said: "That principle has, of course, nothing whatever to do with cases in which there are outstanding interests which the vendor has the power of gathering in, because in that case he is able and he is under an obligation to get them in; but it has a great deal to do with a case in which the only title of the vendor is contingent upon the will and volition of a third person."

In the present case the only title of the defendant is and always has been contingent upon the will and volition of Brice, and he never had otherwise a shred of title.

The other case referred to is Bellamy v. Debenham, [1891] 1 Ch. 412, where there was an agreement for the sale of certain property, and the purchaser, upon discovering that there was a reservation of mines on the land, rescinded. It was held by the Court of Appeal that, as the vendor had not power to convey the mines, nor power to compel a conveyance of them from other persons, the purchaser was entitled, upon discovering this, to rescind the contract, though the time to be allowed for completion had not expired. And with reference to repudiation Lindley, L.J., said in his judgment (p. 420): "The defendant's solicitor in his letter of 20th May says that, as the plaintiff cannot give his client the mines and minerals, he cannot advise his client to complete, and that advice is communicated to the client and adopted by him. It appears to me, therefore, that there was on the 20th May

a plain repudiation on the part of the defendant of all liability to complete, and he has never flinched from that position."

I may also refer to Hoggart v. Scott, 1 Russ. & My. 293, where the vendor, as in this case, had no power whatsoever to sell; and to the judgment of my brother Johnstone in Bannerman v. Green, 8 W. L. R. 441, where the action was for specific performance, but the same principles were in question.

This dispute has arisen simply from the defendant misconceiving his position, owing to his having either to lose the $260 which he paid by mistake to the Bank of Montreal, or to take over the bargain which may not prove a profitable one. But nobody is responsible for this but the defendant himself. He should have dismissed that consideration from his mind and not have allowed it to influence him in carrying out what he had agreed upon with the plaintiff.

There will be an order for rescission, and for a return to the plaintiff of the $260 with interest since 2nd May, 1907, and costs.

YUKON TERRITORY.

MACAULAY, J. OCTOBER 9TH, 1909.

TRIAL.

HOULIHAN v. YUKON DISTRICT GOLD MINING CO.

Master and Servant—Injury to Servant—Negligence—Mine—Dangerous Condition—Warning—Defects in Arrangement.

Action under the provisions of the Employers Liability Ordinance of the Yukon Territory, ch. 5 of the Ordinances of the Yukon Territory, 1908, for damages for injuries suffered by the plaintiff while in the employment of the defendants on or about 8th November, 1908, by reason of a defect in the condition and arrangement of the works and premises connected with, intended for, and used in the business of the defendants, that is to say, defect in the condition and arrangement of a certain tunnel, drift, or excavation, in

which plaintiff was working at defendants' mine, known as the "Venus" mine, at or near Conrad, in the Yukon Territory, and which defect had not been remedied owing to the negligence of one Whitman, foreman at said mine.

George Black, for plaintiff.

F. T. Congdon, K.C., and W. L. Phelps, for defendants.

MACAULAY, J.:—According to the evidence of the plaintiff, he hired with Mr. Vance, the superintendent of the mine, as a mucker or labourer. He says he never did any "single jack" mining, and, although there is some evidence that he, at the time of hiring, represented himself as a miner, it is a fact that he was employed at the mine as a mucker or common labourer. He further says that he was under the orders of W. S. Whitman, commonly known as "Fred" Whitman, foreman at the mine during all the time the plaintiff worked there.

During the forenoon of the day on which the injury occurred the plaintiff was working with one J. K. Downey as a mucker. In the afternoon he worked with Downey until about 2 or 2.30 p.m., when the foreman Whitman asked him to go and assist one Ole Nord, who was putting in timbers or lagging at another part of the mine, which said lagging was used for the purpose of separating the ore from the waste as it was passed into the chute, and during the time the plaintiff was so engaged he was struck by a piece of loose rock and severely injured.

Just before the noon hour, as was the custom, a blast had been set off in the shaft and near where the plaintiff afterwards started to assist Nord in the work of timbering or lagging. Some of the rock, which had been loosened by the blast but had not fallen down, was still hanging to the side of the wall, and one George St. Clair was engaged in the work of picking this loose rock in order that it might fall down and be taken out of the way.

The plaintiff says in his evidence he did not know that this place was particularly dangerous, and he was working there under the orders of the foreman, when a portion of the rock fell and struck him as above stated, from which he undoubtedly received painful and severe injury, having his collar bone broken, 2 ribs broken, and a partial dislocation of the right shoulder; and the evidence of the medical men

shews that, while he will probably recover, he will never have the same free use of his arm as he had before the injury.

James K. Downey was called to give evidence on behalf of the plaintiff, and corroborated the plaintiff in his statement that he and the plaintiff were working together on the morning of 8th November, when the foreman came along and told the plaintiff to go and assist Ole Nord. The next he saw of the plaintiff was after the accident.

William McGrew was also called on behalf of the plaintiff, and gave evidence that he was working at the "Venus" mine on the day of the injury, and heard the foreman telling the plaintiff to go and assist Nord in timbering in the chute. He next saw plaintiff after he was hurt. He thinks he would have done the same as foreman, but the man above should have looked after the man beneath him. A blast of dynamite had been set off at noon. He further says that if he were working in a mine after a blast and saw a man picking above him at loose rock or muck, he would get out of the way. He admitted, however, that he was a miner, and that a mucker might not know of the danger.

Thomas H. Kerruish also gave evidence on behalf of the plaintiff, and in his testimony says that as a miner of 16 years' experience he would say a foreman should not send a mucker to work where work is done above him—it would be gross negligence. "Miners should examine ground after blast." "Foreman should see that ground is safe before muckers were set to work."

For the defence, James Scott was sworn and stated that he resided at Carcross and saw the plaintiff and Vance, the superintendent of the mine, there about 25th October, 1908. He introduced the plaintiff and one Ross, who was the plaintiff's comrade, to Vance. They both said they were miners.

George E. St. Clair was next placed in the box and swore he was a miner. Had been here for 10 years. Was at the 'Venus" mine on the day of the accident, and was the man who had set off the blast at dinner time, and was afterwards the man who was picking the loose rock from the wall of the mine when a portion of the rock fell and injured the plaintiff. He says he heard the foreman, Mr. Whitman, telling the men who were working with the lagging to be careful, as the rock was dangerous. He further says: "I looked and saw Houlihan at the point marked J. (on a sketch produced by the witness), and told him to get out of there, as

the rock was liable to roll down at any time." He further says: "I also heard Whitman, the foreman, tell the plaintiff to be careful, as the rock was dangerous. I then started to pick at end marked K on sketch." He further says: "Anybody who saw the rock would know it was dangerous. Kennedy, another workman, was working at about point marked L. on sketch, about 15 or 20 feet from me and about 15 or 20 feet from the plaintiff." He further says: "The whole slab came down, but some pieces must have rolled. It took me about 20 minutes to take it down. I spoke quite loud to plaintiff. I remember telling plaintiff to get out of there, as this rock was liable to go down on him."

Winfield Scott Whitman was the next witness called for the defence. Stated he was a miner. Had been for 20 odd years. In the Yukon Territory for 3 years as miner and mine-foreman. Was foreman in several mines in California, in the "Le Roi" mine in British Columbia, and was foreman at the "Venus" mine for a year or a year and a half. He says he told the plaintiff to go over to point marked D. on sketch to help Ole Nord do some lagging. He was working at about point marked N. on sketch. "I gave order to him shortly after dinner. I went with him. Saw St. Clair at work, and St. Clair called my attention to loose rock. Plaintiff was right there at time or close to me. I went to point marked Q. on sketch. I told Houlihan to keep out of the way of the loose rock. I then went back to stope. I again met Houlihan at about point marked R. on sketch and said to him, 'You want to look out for that rock," and went down south towards K. I heard St. Clair tell him to get out of the way after I spoke to the plaintiff. I was about 10 or 15 feet from St. Clair, and plaintiff was same distance. I saw Nord and Kennedy also. Nord was working at point K. on sketch. Kennedy was working at about point marked S. on sketch. In lagging it was not necessary for him to be in a dangerous position. If he used precaution he could keep out of danger. I did not know of the condition of the rock when I gave first orders to plaintiff, but as soon as I found out danger I warned him. I have known St. Clair for about a year. He seemed to be careful. I am not in the employ of the defendant company now." On cross-examination he says:

"The last orders I gave him was to keep out of the way of that rock."

Patrick Kennedy was the next witness called. He stated that he was a miner and was working at the "Venus" mine when plaintiff was injured. He was working up stope at left hand side of George St. Clair. Was near point S. marked on sketch. Always worked on left side of George St. Clair. He further says: "I saw two men working there. I came in there with St. Clair. I came to the loose rock with St. Clair. I heard St. Clair say to the men, "Get out of there, this rock is all loose." After I heard warning, the accident occurred. I was about 15 feet from Houlihan at the time St. Clair warned him. He spoke in a loud tone of voice."

Carl Faulk was also called, and stated he was book-keeper for the defendant company. He states that after the accident he saw the plaintiff, who said he had been well treated, and if any one was to blame he was solely so. There was evidence submitted to shew that after the accident the defendant company had the plaintiff removed to the hospital and there treated at the company's expense.

This was practically the whole of the evidence that, in my opinion, was material to the case. Unfortunately the plaintiff was severely injured. He, however, was working in a mine where it was necessary to drill and blast rock in order to take out the ore. A blast had been put in at noon, as was the custom, and in the afternoon he was sent to assist one Ole Nord in doing some lagging. He himself saw that some of the rocks were loose, and he saw St. Clair picking at the loose rocks in order that they might fall down and be cleared away. He says he did not know they were particularly dangerous, and he was directed to work there by the foreman. The foreman, in his evidence, says that when he sent the plaintiff to work at the spot in question he was not aware that a blast had been set off. As soon, however, as he saw that a blast had been set off he warned the plaintiff to keep out of the way until after all the rock came down. Again, a second time, he told the plaintiff to be careful of the loose rock. He further says in his evidence that the plaintiff could have continued his work without placing himself in danger of any of the loose rock falling upon him.

St. Clair, who was picking the loose rock, also swears that he warned the plaintiff to get out of the way. He also swears he heard the foreman warn the plaintiff to get out of the

way; and Patrick Kennedy, who was working near the spot at the time, says in his evidence that he heard St. Clair warn the plaintiff to get out of the way.

Carl Faulk says the plaintiff told him he was well treated and was solely to blame for the accident.

While the plaintiff says he saw the loose rock, he did not think it particularly dangerous. Still he knew a man was picking at it in order to bring it down, and he certainly was negligent in not getting out of the way.

We have the evidence of the foreman Whitman that on two occasions he warned the plaintiff to get out of the way. St. Clair says he heard him warn the plaintiff; that he also warned the plaintiff; and Patrick Kennedy, another miner who was working in the vicinity, says he heard the warning also. Faulk says the plaintiff admitted he was solely to blame.

On the evidence before me it is impossible for me to conclude that the defendants were guilty of any negligence on the part of their foreman which resulted in injury to the plaintiff, nor can I conclude that the injury was caused by any defect in the condition and arrangement of the tunnel, drift, or excavation in which the plaintiff was working. In order to mine the ore it was necessary that blasting should be done. The foreman in warning the plaintiff on two occasions to keep out of danger was performing all the duties that were imposed upon him by his position. Not only did he warn the plaintiff, but others did, and while it is most regrettable that he has suffered the severe injuries which were inflicted upon him, I am not able to conclude that such injuries were caused owing to any negligence on the part of the defendants, but solely by his own negligence in not accepting the warnings which were repeatedly given to him.

Many authorities were cited to me, but I think the principles of law are so well settled in matters of this kind that it is unnecessary for me to refer to them.

As I have come to the conclusion that the defendants are not guilty of negligence, but that the injury was caused to the plaintiff solely by his own negligence, the action will accordingly be dismissed with costs.

YUKON TERRITORY.

CRAIG, J. OCTOBER 11TH, 1909.

TRIAL.

BALTON v. EVANS.

Mines and Minerals — Adverse Claim — Staking — Quartz Regulations, sec. 53—Certificate of Work—Impeaching by Junior Locator—Plan of Survey—Defects in.

Action under sec. 46 of the Quartz Mining Regulations by an adverse claimant to contest the right of possession and to attack a plan of survey made by an adverse owner of mineral claims.

H. S. Tobin, for plaintiff.

R. L. Ashbaugh, for defendant Evans.

C. W. C. Tabor, for defendant Novak.

CRAIG, J.:—The plaintiff staked what is known as the "Francetta" mineral claim on 15th July, 1904, and up to and inclusive of the last year has constantly obtained her certificate of work, the last one carrying the property and renewing the claim up to 18th July, 1909, a date subsequent to the adverse staking of Mitchell, the predecessor in title of the defendant Evans. On the trial the staking of the "Francetta" was admitted, as it appears, by the application put in, and any defects in that application were supplemented by the evidence of Lloyd, who proved the complete staking of the "Francetta." The only attack which the defendants make upon the title of the plaintiff to the "Francetta" is that the work was not done in the year preceding the last renewal and certificate of work. The plaintiff relies upon sec. 53 of the Quartz Regulations, which is in the following words: "Upon any dispute as to title to any mineral claim, no irregularity happening previous to the date of the record of the last certificate of work shall affect the title thereto, and it shall be assumed that up to that date the title to such claim was perfect, except upon suit of the Attorney-General of

Canada based upon fraud." This section is in precisely the same words as sec. 28 of the British Columbia Mineral Act, which section has been repeatedly interpreted by the Courts of British Columbia and by the Supreme Court of Canada. In British Columbia the Courts have uniformly held that such a certificate of work cannot be impeached by any junior locator without the aid of the Attorney-General, that is, that no volunteer can attack the holding of a mineral claim if the holder has a certificate of work from the Crown, and that in itself the production of such a certificate is affirmative evidence of his title.

The plaintiff further relies upon the defects and illegality in the plan of the defendants which they seek to establish under the former section 46 or 63 by advertisement and posting.,

First, as to the question of certificate of title, I am of course bound by the authority of the Supreme Court decisions, namely, the cases of Cleary v. Boscowitz, Martin's Mining Cases 506, and Manley v. Collom, Martin's Mining Cases 487, the former case being 32 S. C. R. 417, 8 B. C. R. 225; the latter, 32 S. C. R. 371, 8 B. C. R. 153. I need not quote any of the arguments or opinions of the Judges except that I think that at this stage of quartz mining in the Yukon Territory it is perhaps useful that a clear understanding should be had of what the law is as settled by the Supreme Court by which we are bound in this Territory, and the judgment of Sedgewick, J., in the case of Cleary v. Boscowitz, puts the matter beyond any doubt and in the clearest and most definite terms: "This case, it seems to me, affords an interesting illustration of what the legislature was aiming at when they passed it. In the present case, on the day when the plaintiffs made their attempt to 'jump' (the word used in the Courts below) the claims, the defendant was their duly located and recorded owner, holding the same as the tenant of the Crown. By the statute, the rental payable by him to the Crown was the annual payment of $100 for five years, or the annual doing of work on the ground for five years. Upon the full payment of $500, or the doing of $500 worth of work, he becomes entitled to a certificate of improvements, which, in its turn, entitled to a patent converting his estate for years into an estate in fee simple, as absolute a title as the law could give him. During this period the

plaintiffs, having no interest in the property, imagined that the tenant Boscowitz had not paid his rent to his landlord, and, coming to the conclusion that the claims had thereby become vacant, located and recorded them under new names as their own. One of the objects (I can imagine many others) which the legislature here had in view was to prevent any legal effect being given to a transaction of that character. A certificate of work once given by the Crown's officer was made conclusive evidence to the world that the tenant had paid his rent; it was made irrefutable and indisputable except upon attack by the Crown itself. So that, as it was admitted in the present case that, at the time mentioned, the respondent had a valid title and had not abandoned it, the paper title held by the appellants and all locations and payments and work made or done by them were absolute nullities forming no basis for the adverse claim set up."

Nothing more remains for me to do than to leave that dictum as it stands.

I refused, under the authority of this case and other cases cited to me, to accept any evidence of the non-performance of the work, following the ruling of these cases. The law, therefore, is, that no irregularity arising after the time of staking can be taken advantage of by an adverse or junior staker; that all these irregularities are healed by sec. 53. One would suppose that this section is broad enough to cover any irregularity, even an irregularity in staking, and I would be disposed myself to think that, if it can heal an irregularity upon which the plaintiff obtained a renewal of her yearly holding, it could also heal on irregularity upon which she first obtained her lease. But that does not seem to be settled law—that any irregularity in staking which would vitiate the original staking is not healed by the certificate or work, but that subsequent irregularities are; in fact, total want of performance of work or performance of it too late are all covered and healed if the holder has obtained and recorded his certificate of work. This would seem absolutely to put a stop to jumping where certificates of work are obtained, even though the work is not done as it should be done or not done at all.

Again, I hold that the plaintiff should succeed owing to the defects in the plan itself. I need not repeat the argu-

ments which I elaborated to some extent in my judgment in Lloyd v. Nicholas, ante 38. The same plan is, by consent, used in this case as was used in that, and, of course, the same defects appear, in particular, the absence of topographical indications upon the plan. I find that even the stakers who originally made application for these claims are able to put down upon their sketches attached to the applications some topographical indications, such as "Sulphur Creek Road," crossing this particular claim, and "Road to Gold Run," near it; also that in the application of Margaret J. Mitchell for the "Little Minnie" she indicates the "Green Gulch" road, the road to "Gold Run," and some other road not named. All of these topographical indications are absent both from the plan of the "Little Minnie" and the "Francetta" except that on the plan of the "Francetta" there is shewn the left fork of "Green Gulch." Both plans are defective in that they do not describe, according to the regulations, the locality of the ground, under the Surveyor-General's instructions. The plan of the "Little Minnie" does not shew the posts and monuments of conflicting claims. It does not indicate the bearings either from astronomical observations or from other ascertained bearings accepted by the Examiner of Surveys, and has all the defects mentioned in my judgment in Lloyd v. Nicholas, ante 38. The very strongest objection to the plan is the total absence of topographical indications. I repeat, as I think it should be emphasised and borne in mind, that these plans are made for the purpose of establishing the finality of titles. They, when passed, if in accordance with the instructions, finally settle the boundaries and the rights of parties concerned, and it would be quite possible, if such a plan were allowed to pass, for an evilly-disposed person to prepare a plan which would throw a person entirely off the scent as to whether his rights were being interfered with or not, and it would give no notice to the public, who are supposed by the posting and the publication to get notice, of what was going on at all. In the interests of the community and to preserve the rights of legitimate claim-holders who are doing their duty, it is well that it should be known as early as possible that such a plan as this cannot and will not be permitted to prejudice the rights of innocent holders of mineral claims whose interests and rights are being attacked under cover of such a document.

The plaintiff is entitled to judgment as prayed, and further I hold that the plan and the publication of it should be disallowed as illegal and improper, and that the possession of the plaintiff should be confirmed in the "Francetta" as surveyed by Gibbons, D.L.S., with the costs of this action.

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SASKATCHEWAN.

PRENDERGAST, J. OCTOBER 29TH, 1909.

TRIAL.

REINHOLZ v. CORNELL.

ADDENDUM.

In Union Investment Co. v. Perras, ante 76, the counsel were:—

O. M. Biggar, for the plaintiffs.
Wilfrid Gariepy, for the defendants.

& Co.

H. A. Archer, Stoughton, for the defendant Cornell.

PRENDERGAST, J.:—On 16th March, 1907, the plaintiff, who was the owner of a team of horses, bargained the same with his son Frederick, receiving from him as consideration therefor a note of even date for $400, bearing interest at 8 per cent., and due 1st October following, and containing the usual clause of lien notes in the words following: "The title, ownership, and right to the possession of the property for which this note is given shall remain at my own risk in F. Reinholz until this note or a renewal thereof is fully paid with interest," etc.

Nothing was ever paid on this note.

Frederick took the horses away from his father's stable to his own place shortly after the bargain, worked them, and put them again in charge of his father after some time, as he was going to work in some other village, and there was no one to attend to them on his own farm. This part of the evidence is rather indefinite, but I find at all events that the horses from that time, although under the control of the father, were still in the constructive possession of his son.

Now, on 1st July of that year, one Krause bought from one Woods a team of horses on credit, and, as Woods required that he should have the security of a chattel mortgage on the team he was selling and on some other team as well, Krause requested Frederick Reinholz to join with him in the mortgage and include therein the team he had bought from his father, the plaintiff, to which Frederick acquiesced, and the mortgage was executed accordingly and delivered to Woods.

Some time after, Woods being indebted to Gaar Scott & Co. for some farming implements, turned over to them certain collateral securities, amongst which was the chattel mortgage in question.

In the following winter (1907-08), not being able to get satisfaction from Woods, M. D. Bacon, collector for Gaar Scott & Co., went to the plaintiff's place, where he saw Frederick Reinholz, and reminded him of the chattel mortgage. Bacon says that the father was there also, and that he did not say that he had a lien on the horses, but he admits that he may not have heard the conversation.

Bacon, however, returned the following fall (about 8th October, 1908), and the plaintiff then told him that he had a lien note on the horses, and that it was registered at Arcola. The fact was that the note was registered not at Arcola, but at Moosomin.

Bacon then went to Arcola, and, finding no lien note registered there, handed over to the defendant Cornell, as bailiff, the chattel mortgage referred to, with Gaar Scott & Co.'s warrant to distrain thereunder.

The defendant Cornell accordingly proceeded to the plaintiff's place on 21st October, made seizure of the two horses, brought them to Stoughton, and announced a sale of them to be held on 12th November.

Cornell, having, however, received on that day a letter from plaintiff's solicitor warning him not to proceed with the sale, and again stating that the lien note was registered at

Arcola, postponed the sale to 16th November, and referred the letter to Bacon. The latter again went to the clerk's office at Arcola, when a more minute search was apparently made, and, again finding no note registered, ordered the bailiff to proceed with the sale.

On 18th November, as soon as the sale was declared open, a justice of the peace living at Stoughton read out, standing in a buggy, to the crowd of about 200 persons who were present, a notice that there was a lien on the horses about to be sold. The horses were, however, sold, one for $135 and the other for $25.

The plaintiff and two other witnesses say that the horses were worth $200 each; the defendant Cornell says $131 and $100.

Otto Reinholz, another of the plaintiff's sons, eventually bought back one of the horses, from the person to whom it had been sold by the bailiff, for $175.

I may say that the mistake of the plaintiff and his solicitor in stating that the lien note was registered in Arcola, while it was in truth registered at Moosomin, was due to the fact that the boundaries of the registration district had in the meantime been altered by order in council.

I hold that there was a wrongful conversion. See Jones v. Dowler, 11 L. J. Ex. 52, and Driffil v. McFall, 41 U. C. R. 313, in which the leading cases are reviewed, and, amongst others, Lancashire Waggon Co. v. FitzHugh, 6 H. & N. 502, where it was said: "It is now settled law that the assumption and exercise of dominion over a chattel for any purpose or for any person, however innocently done, if such conduct can be said to be inconsistent with the title of the true owner, is a conversion."

I would also refer to Jones on Chattel Mortgages, 4th ed., p. 447, where it is stated that the principle laid down with reference to mortgaged chattels will apply to all chattels on which there is a lien.

This is an unfortunate matter, as the defendants acted in good faith, and even endeavoured to make assurance doubly sure by going a second time to the clerk's office at Arcola. It did not occur to them that the registration district might have been altered. On the other hand, those horses were the plaintiff's; he had a lien thereon, he had registered his lien, he made repeated demands for the return of his property, he was equally acting in good faith, and, when he stated that the

note was registered at Arcola, it did not occur to him either, any more than to the defendants, that there might have been a change in the boundaries of the district.

I value one of the horses at $200 and the other at $175, which is the price Otto Reinholz paid for it to the man who had bought it from the bailiff. The other damages I fix at $40.

MANITOBA.

OCTOBER 18TH, 1909.

COURT OF APPEAL.

JOHNSON v. CANADIAN NORTHERN R. W. CO.

Workmen's Compensation for Injuries Act—Status of Administratrix as Plaintiff in Action under—Letters of Administration Granted by Manitoba Court—Cause of Action Arising in Ontario—Application of Ontario Statute —Time Limit.

The plaintiff described herself in the style of cause as "administratrix of the estate of Allan Tait Johnson, deceased," and she alleged that she was the widow and sole administratrix of the estate of Allan Tait Johnson. Her husband was employed as a switchman at Port Arthur, Ontario, and there met with injuries, while engaged in performing his duties, which resulted in his death. The plaintiff alleged that the injuries were caused by the defective state of the grab irons upon the engine upon the step of which deceased was riding at the time of the accident. Other defects and negligence were also alleged. The plaintiff claimed damages at common law and also damages under the Workmen's Compensation for Injuries Act, R. S. M. 1902 ch. 178.

The action was tried before PHIPPEN, J.A., and a jury.

PHIPPEN, J.A.:—It appears to me that the objection that the plaintiff is not the administratrix in Ontario is fatal. The cause of action is entirely statutory. Prior to Lord Campbell's Act there was no right of action for tort resulting in death. The corresponding statute in Ontario is ch. 166 of

R. S. O. 1897. Unless there was such a statute in Ontario, no such cause of action would exist. The plaintiff must, therefore, go to Ontario for her cause of action. That cause of action, as I read the statute, is a cause personal to an executor or administrator in Ontario. It being admitted that there is no executor or administrator in Ontario, no cause of action such as is sought to be enforced ever arose. This is not an action brought by a widow or other person named in the Ontario Act as entitled to bring an action in case an administrator or executor be not appointed, or, being appointed, fails to commence suit. Any such cause of action, being complete in Ontario, might be enforced in Manitoba. If counsel will agree that, in the event of a new trial being ordered, and any of the witnesses who testified yesterday being absent from the province when the action comes on for re-trial, the evidence of such witnesses taken at this trial may be used as evidence taken de bene esse, I think the best course to adopt is to grant the defendants' application for a nonsuit. Most of the evidence has been taken on commisison. Until further ordered this evidence need not be extended for the purpose of an appeal. This will allow the points raised by the defendants to receive full argument and consideration at the least possible expense. I would suggest that before the nonsuit be entered, the plaintiff make an application to amend the statement of claim by striking out the words, "administratrix of the estate of Allan Tait Johnson, deceased," and in the first paragraph the words, "and the sole administratrix of the estate of the said Allan Tait Johnson."

If the plaintiff desires, she can then make an application for a new trial: first, on the ground that she was entitled to a verdict in the action as framed; and, in the alternative, that the statement of claim be amended as suggested and a new trial ordered.

Counsel for the plaintiff applied to amend as suggested, and PHIPPEN, J.A., refused the amendment and entered a nonsuit with costs.

The plaintiff appealed, and her appeal was heard by HOWELL, C.J.A., RICHARDS, PERDUE, and CAMERON, JJ.A.

C. P. Fullerton and G. Moody, for the plaintiff.

O. H. Clark, K.C., for the defendants.

PERDUE, J.A.:—It is plain that there is no common law right to damages in this case, and that the plaintiff's right to recover, if it exists at all, must be under the provisions of the Workmen's Compensation for Injuries Act, R. S. M. 1902 ch. 178. Now the injury took place in Ontario, and it is clear that the Manitoba Act cannot apply: Jefferys v. Boosey, 4 H. L. C. 815; Beal's Rules, 2nd ed., pp. 232-238.

There is no allegation in the statement of claim that a similar statutory provision exists in Ontario. As a matter of fact there is a Workmen's Compensation for Injuries Act in force in Ontario, containing provisions very similar to ours. Under that Act the administratrix of the deceased person whose death was caused by the injury, may bring the suit. For the reasons that I have more fully set forth in the case of Couture v. Dominion Fish Co., 19 Man. L. R. 651, 11 W. L. R. 412, the word "administrator" used in the Ontario Act refers to an administrator appointed in Ontario by an Ontario Court, and having the rights and powers and being subject to the obligations imposed upon such office by the Ontario law. Even if the necessary amendments were allowed so as to allege the existence of an Ontario law giving the administratrix of the deceased the right to recover, it is admitted that she has not obtained administration in Ontario. She has not, therefore, brought herself within the Ontario law so as to be entitled to maintain an action as administratrix in that province in respect of the death of the deceased. If she has not the legal capacity to sue in Ontario for a wrong which took place there, she cannot sue in Manitoba. The rights of the parties in regard to the statutory tort in question must be governed by the laws of Ontario, the province in which it took place. "A right of action, whether it arise from contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto. The terms of the contract or the character of the subject matter may shew that the parties intended their bargain to be governed by some other law; but, prima facie, it falls under the law of the place where it was made. And in like manner the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law:" per Willes, J., delivering the judgment of the Court of Exchequer Chamber in Phillips v. Eyre, L. R. 6 Q. B. 1, at p. 28; see also The Moxham, 1 P. D. 107. The foundation of this action is a tort created by statute and unknown to the common law. If the Manitoba

statute is invoked, the answer is that that statute had no force in Ontario, where the alleged wrong was committed. If the Ontario statute is relied upon, then the plaintiff must bring herself within that statute.

The plaintiff applied at the trial to amend by striking out the words "administratrix," &c., and to bring the suit in her name as widow of the deceased. The Ontario Act allows the widow to sue if no executor or administrator has been appointed. The application to amend was renewed before this Court. To allow the amendment would be equivalent to the bringing of a new action. The suit was clearly brought by the Manitoba administratrix, as such. The amendment would permit a new person to sue whose right of intervention depends upon the absence of an executor or administrator of the estate of the deceased. Such a new action would be subject to the time-limit imposed by the Ontario statute for the bringing of the action, namely, one year. The trial at which the application to amend was first made took place more than a year after the occurrence of the injury causing the death of the deceased. The statute which confers the right of action declares that an action for compensation shall not be maintainable unless certain notice is given and the action is commenced within 12 months after the occurrence of the accident causing the injury or death. The time-limit imposed would, therefore, on its expiry without the commencing of an action, operate as a bar to the bringing of an action in Ontario after that time, and would take away the right of action created by the statute. A Manitoba Court must, in dealing with this action, apply the Ontario statute which gave the right to recover compensation. If that statute provides that after a year an action shall not be maintainable in respect of such right to recover compensation, such provision must be regarded as a discharge of the right operating upon the expiration of the time. The clause imposing the time-limit must be read in conection with that giving the right. It is not as if a statute of limitation were passed limiting the time for bringing an action in respect of a right theretofore existing. The very statute which creates the right limits the time within which an action is maintainable. Therefore, the clause limiting the time should be regarded as a condition imposed by the legislative body which conferred the right, and which declares in effect that no compensation shall be recoverable unless sued for within a year. "Where an obligation by contract to pay a

debt or damages is discharged and avoided by the law of the place where it was made, the accessory right of action in every court open to the creditor unquestionably falls to the ground. And, by strict parity of reasoning, where an obligation ex delicto to pay damages is discharged and avoided by the law of the country where it was made, the accessory right of action is in like manner discharged and avoided:" Phillips v. Eyre, L. R. 6 Q. B. at p. 30. Where, therefore, by statute a right is created subject to a condition, the party claiming the right should not be permitted to avoid the condition by suing in another country and alleging that the condition only affects procedure and therefore is not binding in the country where the suit is brought.

For the reasons I have set forth in Couture v. Dominion Fish Co., supra, I am of the opinion that the line of American authorities commencing with Dennick v. R. R. Co., 103 U. S. R. 11, should not be followed by this Court.

I think the appeal should be dismissed with costs.

HOWELL, C.J.A.:—I cannot distinguish this case from Couture v. Dominion Fish Co., 19 Man. L. R. 651. In that case I thonght the plaintiff entitled to recover, for the reasons there given. The majority of the Court, however, decided the other way, and I am bound by it.

The appeal must be dismissed with costs.

RICHARDS and CAMERON, JJ.A., concurred.

MANITOBA.

OCTOBER 20TH, 1909.

COURT OF APPEAL.

SHILLINGLAW v. WHILLIER.

Costs—Defamation—Verdict for Nominal Damages—Right to Award Costs—Discretion of Trial Judge and Court of Appeal—King's Bench Act, Rule 931 (a)—Libel Act. R. S. M. 1902 ch. 97, sec. 13—7 & 8 Edw. VII. ch. 12, sec. 3—9 Edw. VII. ch. 30, sec. 2—Repeal and Interpretation of Statutes.

Appeal by the defendant from the judgment of RICHARDS, J.A., at the trial, refusing to deprive the plaintiff of the costs

of an action for slander, which was tried with a jury, who found a verdict for the plaintiff for $1 damages.

The plaintiff was the city engineer of Brandon. The question of his services being retained by the corporation having come up in council, the defendant, who was an alderman, made certain statements reflecting on the plaintiff's competency, in consequence of which this action was brought.

Special leave to appeal on the question of costs was given to the defendant.

The appeal was heard by HOWELL, C.J.A., PERDUE and CAMERON, JJ.A.

J. P. Curran, K.C., for plaintiff.

S. H. McKay, for defendant.

HOWELL, C.J.A.:—I cannot distinguish this case from the jury found a verdict for the plaintiff, and assessed the damages at $1; the sole question is as to the costs to which the plaintiff is entitled.

If it were an ordinary action, in a case where the County Court had no jurisdiction, and there was no certificate by the trial Judge, the plaintiff, under Rule 931 (a), would be entitled to tax full costs. This Rule, however, must be read as qualified by sec. 13 of the Libel Act, R. S. M. 1902 ch. 97, contained in the same statutes.

For centuries it has been the policy of the law practically to grant no costs to the plaintiff where the jury give merely nominal damages, and the Manitoba Libel Act was passed to continue this wholesome practice.

It is argued that the continuity of this practice was broken in upon by the Act 7 & 8 Edw. VII. ch. 12, sec. 3, whereby costs are placed in the absolute discretion of the Judge. It seems to me that sec. 1 of the Act, limiting the total costs of the trial to $300, and sec. 2 limiting the costs of appeal to $100, would clearly apply to a libel action.

This matter is further complicated by the amendment of the Libel Act in 9 Edw. VII. ch. 30. Section 13 of the Libel Act is there treated as still the law. Let us examine the three clauses side by side without regard to the enactment of 7 & 8 Edw. VII. above referred to.

The King's Bench clause (Rule 931 (*a*)) is as follows: "(*a*) Provided, that, where any action or issue is tried by a jury, the costs shall follow the event, unless, upon application made at the trial, for good cause shewn, the Judge

before whom the action or issue is tried or the Court otherwise orders."

Section 13 of the Libel Act is as follows: "The Judge before whom such action as aforesaid is tried shall not award costs to the plaintiff where he recovers merely nominal damages."

The amendment to this clause by 9 Edw. VII. is as follows: "Section 13 of the said Act is hereby amended by adding thereto the following proviso, 'Provided, that in any case coming under section 11 A of this Act, costs may be awarded to the plaintiff, although he recovers merely nominal damages.'"

Now what is the meaning of these three sections? By the first one, costs follow the verdict by force of law, and are taxed by the taxing Master, and judgment is entered for them without any order "awarding" the costs; but this course of law may be averted if, "for good cause shewn," the Judge or the Court order or (I suppose I may use the word) "award" otherwise.

By the second, the Judge shall not "award" costs where the verdict is nominal, but it does not say, although I think it must imply, that costs shall not follow the event of the verdict.

By the third, the provision is that the costs may be "awarded to the plaintiff although he recovers merely nominal damages," and costs are in this case not merely left to follow the event; some branch of the Court must "award" the costs. If they are to be awarded, it cannot be that the taxing Master has the discretion; it must be the trial Judge, and it must be, apparently, in his discretion; but judgment for costs to the plaintiff could not be entered without an order.

Before the enactment of the third clause above commented on, the Act of 7 & 8 Edw. VII., above referred to, came in force, and I have shewn that, in my view, the first and second sections apply to libel actions. The third section enacts that "in all actions, suits, and proceedings in either of said Courts the awarding of costs . . . shall, subject to this Act, be in the absolute discretion of the Court or Judge." Section 18 declares that "this Act shall apply to all actions or proceedings."

Let me assume that the wide and inclusive language above quoted is sufficient to include actions under the Libel Act,

and so to repeal by implication sec. 13—and there seems to be authority to support this conclusion in Garnett v. Bradley, 3 App. Cas. 944, where it was held that the English Rule from which our Rule 931 was copied repealed the statute of Jac. I. respecting costs in libel actions. Then follows this difficulty: if Rule 931 (*a*) is still the law, costs must be given to the plaintiff, unless, "for good cause shewn," the Judge orders otherwise, which is not absolute discretion, but might apparently be appealed against if there is not "good cause:" Collins v. Welch, 5 C. P. D. 30; Marsden v. Lancashire, 7 Q. B. D. 641. Again, if Rule 931 is repealed, trustees and mortgagees have lost their absolute right to costs, therein protected. If clause (*a*) is repealed, then in every case of trial by jury the Judge must make an absolute order as to costs, because costs do not follow the event by force of law.

If the absolute rights to costs reserved to trustees and mortgagees and in jury cases, under Rule 931, still exist, then sec. 3 is largely meaningless, and did not extend the Judge's "absolute" discretion as to costs, except in a minor way, in the very latter portion of the section. The Act is in many respects radical as to costs, and I cannot say that sec. 3 was intended not to interfere with Rule 931.

Out of this confusion a conclusion must be arrived at. With much doubt I conclude that sec. 13 of the Libel Act is no longer the law, and that clause (*a*) of Rule 931 has followed the same fate, and, as a necessary incident where a verdict is given by a jury, costs will only be entered on a judgment of the trial Judge or perhaps of the Court.

In this case the learned trial Judge made the following memorandum: "If sec. 3 of ch. 13 of 7 & 8 Edw. VII. repeals Rule 931 (*a*), it would probably also repeal sec. 13 of the Libel Act. If it repeals them both, then I certify to entitle the plaintiff to recover full costs up to the limit provided by that section, and to prevent the defendant from setting off costs."

If this is not sufficient to justify the entry of judgment for costs to the plaintiff, no doubt the trial Judge will now make an order on application, as it was apparently his intention so to order.

There will be no order as to costs of this appeal.

PERDUE, J. A.:—This was an action of slander, and the jury brought in a verdict of $1.

The question involved in this appeal is, whether Rule 931 of the King's Bench Act and sec. 3 of ch. 12 of 7 & 8 Edw. VII. repealed sec. 13 of the Libel Act, R. S. M. 1902 ch. 97, and, if so, was said sec. 13 revived or re-enacted by 9 Edw. VII. ch. 30, sec. 2?

By clause (*a*) of Rule 931, where an action or issue is tried by a jury, the costs shall follow the event, unless the Judge otherwise orders.

Section 13 of the Libel Act is as follows: "The Judge before whom any such action as aforesaid (referring to actions of libel or slander) is tried shall not award costs to the plaintiff where he recovers merely nominal damages."

The above section 13 was passed in the year 1887, but has been retained in the statutes, as revised, ever since. Upon the authority of the decision of the House of Lords in Garnett v. Bradley, 3 App. Cas. 944, I think it is clear that Rule 931 (*a*), which dealt with the question of costs in actions tried by a jury, of necessity repealed previous Acts dealing with the same matter wherever they were inconsistent with it. The Revised Statutes of 1902, however, contain both the above Rule and sec. 13 of the Libel Act. It is therefore argued that sec. 13 was revived or re-enacted by force of the Revised Statutes, that it is a special provision relating to particular actions, and is therefore excepted from the operation of the Rule.

Whatever force there might be in this contention, the matter appears to be set at rest by 7 & 8 Edw. VII. ch. 12, sec. 3. That section enacts that "in all actions, suits and proceedings . . . the awarding of costs and apportionment of same between the parties on the same or adverse sides shall, subject to this Act, be in the absolute discretion of the Court or Judge." By sec. 18 it is declared that the Act shall apply to all actions and proceedings. The plain intention and effect of sec. 3 of the last mentioned Act is to give to the Judge presiding at the trial of any action full power to award or refuse costs to either party. This overrides, and in effect repeals, sec. 13 of the Libel Act. Where an Act gives the Judges power to exercise their judicial discretion in every case as to costs, this of necessity repeals previous Acts which directed costs to follow certain rules and gave the Judges no discretion in the matter: Garnett v.

Bradley, 3 App. Cas. 944; Parsons v. Tinling, 2 C. P. D. 119.

By sec. 2 of ch. 30 of the statutes passed at the last session of the Legislature, it was declared that sec. 13 of the Libel Act should be amended by adding a proviso that in certain cases costs may be awarded to a female plaintiff, although she recovers merely nominal damages. This enactment was evidently passed inadvertently and without giving to 7 & 8 Edw. VII. ch. 12, sec. 3, the effect it has upon a proper construction being placed upon it. The enactment of the last session sought to give to the Judge presiding at the trial of an action of the nature referred to in the enactment, a power of awarding costs which he already possessed under the enactment of 7 & 8 Edw. VII. It was not, therefore, inconsistent with the then existing state of the law, and had no effect upon the enactment of the previous session.

The intention of the provision passed in the present year was to give the Judges a power they already possessed under a proper construction of the statutes. The conferring of this power was all that the legislature had in mind when it enacted the provision. There was no intention of re-enacting or reviving sec. 13 of the Libel Act.

I think the appeal should be dismissed, without costs.

CAMERON, J. A.:—Section 1 of ch. 12 of 7 & 8 Edw. VII. provides that "the amount of costs exclusive of disbursements . . . which may be taxed and allowed to the successful party in any action or proceeding of any nature or kind whatsoever . . . shall . . . be limited to the sum of $300," subject to the proviso contained in said section. It has not been and cannot be disputed that this section applies to actions for libel.

Section 2 of ch. 12 provides that "no greater sum than $100 . . . shall be taxed or allowed for costs of appeal from the final disposition of an action or proceeding in the Court of King's Bench, to the successful party in any appeal to the Court of Appeal," subject to the proviso in said section. It is admitted, without dissent, that this section also applies to actions for libel.

Section 3 of ch. 12 provides that "in all actions, suits, and proceedings in either of said Courts, the awarding of costs and the apportionment of the same between the parties on the same or adverse sides shall, subject to this Act, be in the absolute discretion of the Court or Judge."

It seems clear to me that the intention of these sections is to provide an entirely new code on the subject of costs, to substitute these provisions for previous legislation, and to repeal all existing legislation that might be inconsistent therewith. To me it also seems clear that this intention has been fully and adequately expressed, and that, as the law now stands, in the awarding of costs the Judge at the trial, or the Court on appeal, is to have "absolute discretion," subject only to the provisions of sec. 1 or sec, 2, as the case may be.

If there should be deemed to be the slightest doubt on this point, sec. 18 of ch. 12 is, to my mind, decisive as to the legislature's intention in declaring that "this Act shall apply to all actions and proceedings, including those pending at the time it came in force, but shall not affect the taxation of costs in such actions already begun." We have no authority to add to this section the words: "and shall not affect actions of libel whether commenced before or after this Act comes into force."

I take it that this view is entirely in accord with the instructive judgment of Lord Blackburn in Garnett v. Bradley, 3 App. Cas. 962, where is was held that the statute 21 Jac. I. ch. 16 is (so far as the action for slander is concerned) repealed by the effect of Order LV., made under the authority of the Judicature Act, 1875. At p. 965 he says: "An Act saying that all statutes inconsistent with itself shall be repealed, really goes no farther than the general law." As to what constitutes inconsistency in such cases, see his judgment at pp. 966 and 967. On the question of the repeal of a particular Rule by an enactment couched in general words, he holds at p. 969, that "there is a strong presumption that the legislature did not intend to take away a particular privilege, or right, or property of a particular class, unless it has done something to shew that. . . ." But, considering this Rule with reference to the case before him, he held it did not apply at all. The statutes in question were not passed in favour of a particular class of persons, but in favour of all Her Majesty's subjects. "That it should be taken that the object of the legislature is not, by mere general words, to repeal special laws, is a perfectly good, true, and sound canon of construction, and, if this was a case of special laws giving a privilege or a property, or a right, to a particular class, the canon would be applicable, but it is not applicable when that special law affected every one of Her Majesty's

subjects . . . and not any particular class. I think, therefore, the reason of the Rule does not apply in this case." The judgment in Garnett v. Bradley is discussed and commented on in Rockett v. Clippingdale, [1891] 2 Q. B., per Lord Esher, M. R. at p. 298, and per Fry, L. J., at p. 299.

Section 13 of the Libel Act having been repealed by ch. 12 of 7 & 8 Edw. VII., sec. 2 of ch. 30, 9 Edw. VII., was obviously enacted under a misapprehension as to the state of the law then existing, and is therefore inoperative and void.

MANITOBA.

METCALFE, J. NOVEMBER 1ST, 1909.

SINGLE COURT.

ADAMS v. WOODS.

Municipal Corporations—Local Option By-law—Liquor License Act, sec. 62—Petition for Submission of By-law — Signatures — Detachment — Mutilation — Insufficiency —Injunction.

Motion by the plaintiff, the owner of an hotel property situate in the rural municipality of Pembina, for an interim injunction restraining the defendants, the reeve and councillors of that municipality, from proceeding to pass a by-law forbidding the receipt by the municipality of any money for a license under the Liquor License Act.

A. J. Andrews, K.C., and F. M. Burbidge, for plaintiff.

E. L. Taylor, K.C., for defendants.

METCALFE, J.:—Section 62 of the Liquor License Act, as enacted by sec. 2 of ch. 31 of the statutes of 1909, provides as follows: "62. A local option by-law shall be voted on by the people as hereinafter provided, and shall be submitted to be voted on on the day fixed by law for the polling at the next municipal elections for the municipality, if, not later than the 1st day of October in any year, a petition from 25 per cent. in number of the resident electors whose names appear on the last revised municipal voters' lists of said

municipality, asking the council to do so, is received by the clerk, and it shall be the duty of such council at its first regular meeting after the receipt of such petition by the clerk, or at a special meeting to be called by the clerk, if necessary, to pass the first and second readings of such by-law before the 1st day of November following."

A document purporting to be a petition was on 1st October last presented to the council in meeting assembled by Messrs. McCharles and Tate, who assumed to act on behalf of the petitioners. At the top of the petition, and with only 14 signatures attached, is a sheet of paper in foolscap size, and at the top of this sheet is printed a petition in the words following:—

"LOCAL OPTION BY-LAW.

"To the Municipal Council of the Municipality of Pembina:

"Gentlemen,—The petition of the undersigned resident electors whose names appear on the last revised voters' list of said municipality humbly sheweth that:

"Whereas it is provided by section 61 of the Liquor License Act of the province of Manitoba that no license shall be granted by the commissioners for the sale of liquor within the limits of a municipality, when it shall have been made to appear to the commissioners that a by-law has been passed by said municipality forbidding the receiving by said municipality of any money for a license for such purpose.

"And whereas it is further provided by said statute that a local option by-law shall be voted on by the people as thereinafter provided, and shall be submitted to be voted on, on the day fixed by law for the polling at the next municipal elections for the municipality, if the municipal clerk receives not later than the 1st day of October in any year, a petition from 25 per cent. in number of the resident electors whose names appear on the last revised municipal voters' list of such municipality, asking them to do so, and it shall be the duty of such council, at their first regular meeting after the receipt of such petition, or at a special meeting to be called by the clerk, if necessary, to pass the first and second readings of such by-law before the 1st day of November following.

"And whereas it is further provided by said statute that any such by-law shall require the assent of a majority of the electors of the municipality, whose names appear on the last

revised municipal voters' list of such municipality, who vote on such by-law.

"And whereas it is further provided by said statute that any such by-law which is carried by said majority of the duly qualified electors, shall, within six weeks thereafter, be read a third time and passed by the council of the municipality in which same was submitted.

"Therefore, the undersigned resident electors of the said municipality petition your honourable body to pass such a by-law and submit the same to the electors of the municipality in accordance with the provisions of the said Liquor License Act.

"And your petitioners will ever pray."

There are two blank spaces at the beginning, and the words "Municipality" and "Pembina" appear to be in writing.

Another sheet, with signatures attached, is gummed to the bottom of the first sheet; to this in turn is gummed another sheet, and so on, all the sheets being thus gummed together and making one continuous sheet. At the top of each of such sheets so gummed on there was originally some printed matter. It may be that the printed matter was identical with the printed matter at the top of the first sheet, but in pasting these on they have been cut, mutilated, and destroyed so that this fact could not be established without oral evidence. From the condition of the petition it would appear that the signatures were obtained to the several sheets. This was brought to the attention of the council, in the presence of McCharles and Tate, and it was there stated by McCharles that the signatures were obtained to the separate sheets, that it was thought more convenient to gum these separate sheets together, and that the apparent mutilation then took place.

The signatures appended to that form of the petition, as it was when originally signed, are not 25 per cent. in number of the resident electors whose names appear on the last revised voters' list of the municipality.

The municipality is preparing to submit the by-law to the ratepayers as provided by the statute, and is about to incur the expense of advertisement. printing of ballots, etc.

Counsel for the applicant offered testimony in support of his application. Counsel for the municipality urges that

no testimony should be received on a motion of this nature, and nothing but the documentary evidence should be viewed. I, however, under Rule 475 of the King's Bench Act, admit testimony subject to such objection.

Counsel for the municipality further urged that there is an adequate remedy in case the by-law should be carried, namely, the provisions of the Municipal Act relative to quashing by-laws, and that, there being such remedy, this motion to restrain should not be entertained. He urges in support of this contention, Little v. McCartney, 18 Man. L. R. 23, 9 W. L. R. 448. In that case the municipality had received a petition, but had neglected to publish the notices required by sec. 66 of the Act. It was held that under these circumstances a motion for an injunction should not be entertained. (In that case, however, a petition had been received by the municipality, and that fact clothed the municipality with jurisdiction under said sec. 62.

Has a petition been filed in this case? Counsel for the applicant urges that the document here filed is not a petition at all, in compliance with the section, and refers to Re Williams and Town of Brampton, 17 O. L. R. 398. That case was decided upon a section of the Ontario Act the material parts of which are as follows: "In case a petition in writing signed by at least 25 per cent. of the total number of persons . . . qualified to vote at municipal elections, is filed with the clerk of the municipality on or before the 1st day of November . . . praying for the submission of such by-law"—a local option by-law—"it shall be the duty of the council to submit the same to a vote of the municipal electors as aforesaid."

It is true that our Act does not expressly require the petition to be signed, neither does it require it to be in writing. The word "petition" is used, however, and I think I must give it its general sense as used throughout the Liquor License Act. The context, too, in my opinion, implies that the petition is to be in the usual form, in writing and signed by the petitioners.

The motion in Re Williams and Town of Brampton was for a mandamus. It was argued before Chief Justice Meredith, who stated that it was presented to him in a very unsatisfactory way, and that in giving judgment under the circumstances he had to do so more or less in an off-hand way. The petition was evidently prepared in a manner similar to

the petition in question in this case. The Chief Justice held that it was a good petition. On appeal to a Divisional Court this judgment was reversed, all the Judges concurring, and the reasons they advanced appear to me to be conclusive. Chief Justice Mulock says, at p. 405: "Here the prayer to which most of the subscribing electors attached their signatures was not filed, but, in lieu thereof, what was said to be a copy. Whether it is or is not a copy depends upon parol evidence. The statute does not contemplate the council ascertaining by extrinsic evidence what documents the electors signed, but entitles the council to have filed with the clerk the actual paper containing the very words to which the electors appended their signatures; otherwise grave abuse of the petitioning power conferred upon the electorate by the statute in question might result, and it is reasonable to assume that the strict language of the statute was adopted by the legislature in order to prevent such abuse. It is our duty to interpret its meaning, and, if possible, to give effect to its provisions. Were we, here, to read into the statute a provision that the prayer of the petition actually signed by the electors need not be filed, but that an alleged copy thereof would suffice, we should, I think, be legislating, instead of interpreting what the legislature enacted. Being thus of opinion that no petition, meeting the requirements of the statute, was filed with the clerk, no duty was cast upon the council to submit the by-law, and, therefore, with all respect for the views expressed in the judgment appealed from, I think this appeal should be allowed with costs to the appellant, including costs of the motion below." Anglin, J., at p. 407, says: "But upon the main question—whether a petition in compliance with the requirements of the statute was, in fact, filed—I find myself, with very great respect, unable to agree with the view of the learned Chief Justice of the Common Pleas. The document actually before the council was, in fact, signed by only two of the alleged petitioners. Appended to it, when filed with the town clerk, were the signatures of a great many other electors, which had been detached by the Rev. Dr. Burns from the headings to which they were subscribed by the electors, and then attached to this sheet, containing a heading in the same words as that which these electors had in fact signed. It is urged by the respondent that the document thus put together was a petition signed by at least 25 per

cent. of the qualified voters of the municipality, because uncontradicted affidavits establish beyond doubt that there was an entire absence of fraud on the part of Dr. Burns, and that the persons whose signatures were sent to the council did in fact sign a petition identical with that presented. There is not the slightest suspicion in this case of any intentional wrong-doing on the part of Dr. Burns. But the fact remains that the document sent to the council was not actually signed by the electors whose names now appear appended to it. To that document as a physical entity they never placed their signatures, and it is not, in my opinion, a petition in writing signed by 25 per cent. of the electors, within the meaning of the statute. While it may be quite certain that, in the circumstances of the present case, no actual wrong would be done by treating this document as sufficient, it would be extremely perilous to create a precedent which would, as Mr. Haverson very forcibly put it, open the door to frauds of the most dangerous kind—frauds which affidavits of apparently reputable witnesses might successfully cover up. The Courts cannot be too careful to discourage the alteration or mutilation of documents." Clute, J., at p. 410, says: "I am, however, of opinion that the petition as filed was insufficient in form." He further says, at p. 412: "To say that, though the signers did not affix the names to the petition presented, they did affix them to another similar petition not presented to the Board, is no answer. . . . If a practice of this kind were tolerated, it would open the door to numerous frauds, and would result in substituting oral proof for that which the statute requires to be in writing."

I therefore think that the document presented to the council was not a petition within the meaning of the Act. It therefore follows that the council have no jurisdiction to proceed to submit a by-law to the people, and in doing so are performing an unlawful act and ought to be restrained.

An order will therefore be made accordingly with costs to the applicant.

MANITOBA.

METCALFE, J. NOVEMBER 1ST, 1909.

SINGLE COURT.

HATCH v. RATHWELL.

Municipal Corporations — Local Option By-law — Liquor License Act, sec. 62—Petition for Submission of By-law —Signatures—Detachment—Revival of Petition Prepared in Previous Year—Insufficiency—Injunction.

This was a similar motion to that in the preceding case, Adams v. Woods.

METCALFE, J.:—Motion made on behalf of the owner of a hotel property within the rural municipality of Oakland to restrain that municipality from proceeding further upon a proposed by-law, No. 206, which has received its first and second readings, and which the municipality are about to submit to a vote of the ratepayers under sec. 62 of the Liquor License Act, as enacted by sec. 2 of ch. 31 of the statutes of 1909.

The petition upon which the council rely is contained on various sheets of paper, at the top of which is printed—and in some cases typewritten—a petition in the form as set forth in the case of Adams v. Woods. It appears that these several sheets, apparently attached together, were left with the clerk of the municipality in the year 1908, the petitioners intending that it should be acted on in that year. Since that time the conditions have altered, as the village of Wawanesa, then within the boundaries of the municipality, has been incorporated, and some of the signatures to the petition were of ratepayers residing in the village of Wawanesa.

Such petition, however, was not presented to the council of 1908, and, without authority from the council, was, by the said clerk, handed to the Rev. R. M. Stevenson, who assumed to act on behalf of the petitioners, and a large number of the names were by him struck off. Afterwards, on the 19th March, 1909, this same petition was presented to the council, and the clerk was ordered to prepare a by-law, which received its first and second readings on the 5th June, 1909.

It appears that the council is about to incur expense of advertising and the printing of the ballots.

Counsel for the municipality raised the same objections as in the case of Adams v. Woods.

The facts, as above stated, are admitted for the purpose only of receiving testimony, and, subject to the objection of counsel for the municipality, that testimony ought not to be received upon this motion.

Counsel for the applicant urges that the petition is not such a petition as is required by sec. 62. He contends strongly that the petitioners intended the document to be a petition to submit local option during the year 1908, and not during the year 1909; that conditions have altered; and that it is not intended by the statute that a petition to submit a by-law during one calendar year should be received as a petition for the following or any subsequent calendar year.

After carefully considering sec. 62, I am of the opinion that the so-called petition in this case is not such a petition as is contemplated by sec. 62, and that therefore the council, in assuming to submit the by-law to the vote of the people, is acting without jurisdiction.

There should be an order similar to that made in Adams v. Woods.

MANITOBA.

MACDONALD, J. NOVEMBER 8TH, 1909.

CHAMBERS.

ADCOCK v. MANITOBA FREE PRESS CO.

Security for Costs—Action for Libel—R. S. M. 1902 ch. 97, sec. 10 — Increased Security — Practice — Order for Security — Terms — Dismissal of Action in Default — King's Bench Act, Rule 978 — Amount of Security — Limitation—Discretion.

Appeal by the plaintiff from an order of the Referee requiring the plaintiff to give additional security for costs.

H. P. Blackwood, for the plaintiff.

H. Ormond, for the defendants.

MACDONALD, J.:—This action is one of libel, and under sec. 10 of the Libel Act, R. S. M. 1902 ch. 97, the defendant may apply to the Court in which such action is pending for security for costs, upon an affidavit made by the defendant applying, shewing the nature of the action and of the defence, and that, in the belief of the defendant, the plaintiff is not possessed of property sufficient to answer the costs of the action in case a verdict or judgment be given in favour of the defendant, and that the defendant has a good defence to the action on the merits, as he, the deponent, is advised and believes.

On 10th February, 1909, an order had been made for security for the costs of the action, directing that the plaintiff give security in the sum of $300 to answer the costs of the defendants in this action, in accordance with which said order the plaintiff deposited a bond to secure that sum.

Upon the trial of the action before Mr. Justice Cameron with a jury, the trial proved abortive, the jury having disagreed, and, upon notice of trial being served for the assizes now being held in the eastern judicial district, the defendants applied for further security for costs, and the order of the 28th October, 1909, now appealed from, was made.

Several objections are urged by counsel for the plaintiff:—

First, that the order provides that in default of such security being given this action be dismissed unless the Court or Judge, upon special application for that purpose, shall otherwise order, and that such a provision is beyond the power of the Referee to make, the Act not providing for it, but providing for a stay of proceedings only.

Section 10 referred to provides, however, that the plaintiff shall give security for the costs to be incurred, in the same manner as and in accordance with the practice in cases where a plaintiff resides out of the province, and such order shall be a stay of proceedings in the case until the proper security be given.

Rule 978 of the King's Bench Act provides for an order directing security for costs by a plaintiff who resides out of Manitoba and for a stay of proceedings pending the giving of such security, and for a dismissal of the action in the event of security not being given. This Rule and the Rules following governing "security for costs" are made applicable to the case under consideration, and such an action may

be dismissed upon the same grounds as in case of a plaintiff resident outside of Manitoba.

Second, that the plaintiff could not recover costs to an amount in excess of $300, and that there is no provision for security in excess of $200. The Rule limiting the costs of suit taxable against an unsuccessful party to $300 provides that the trial Judge shall have a discretion to order the allowance of any greater amount within the limit of costs ordinarily taxable, and, as the costs of the abortive trial would depend on the result of a new trial, the costs of both actions might exceed the $300, which excess the trial Judge might allow the successful party, and, as sec. 10 of the Libel Act does not limit the amount of the security, these contentions are ineffective.

The material upon which the motion for security was and is made is fully within the requirements of the Act, and, the learned Referee having exercised his discretion, I find no ground for interfering with it.

The appeal is dismissed with costs.

MANITOBA.

MACDONALD, J. NOVEMBER 19TH, 1909.

SINGLE COURT.

LARKIN v. POLSON.

Municipal Corporations—Local Option By-law—Petition for Submission to Electors—Insufficiency — Mutilation—Injunction.

Application by the plaintiffs for an injunction to restrain the defendants the rural municipality of Rockwood from submitting to the vote of the ratepayers a local option by-law.

A. J. Andrews, K.C., and F. M. Burbidge, for plaintiffs.

E. L. Taylor, K.C., for defendants.

MACDONALD, J.:—The petition was presented to the clerk of the municipality before its mutilation by the parties hav-

ing charge of it, and, if the petition was then in proper order and within the requirements of the Act, its presentation would be sufficient.

It is admitted by counsel for all parties interested that there are 48 names appended to the petition in excess of the number required to support the same.

Section 62 of the Liquor License Act provides that "a local option by-law shall be voted on by the people as hereinafter provided, and shall be submitted to be voted on on the day fixed by law for the polling at the next municipal elections for the municipality if, not later than the 1st day of October in any year, a petition from 25 per cent. in number of the resident electors, whose names appear on the last revised municipal voters' list of said municipality, asking the council to do so, is received by the clerk," etc.

To simplify the obtaining of the signatures of the resident electors, a number of petitions were circulated and signatures obtained, and, when the required number of signatures was thus obtained, the documents were handed to the clerk of the municipality.

On the clerk seeing the condition in which these petitions were, a suggestion was made as to how they should be put together, and they were handed back to the person presenting them, to carry into effect such suggestion. The person in charge of the documents then made the many petitions into one by cutting off the heading to the numerous petitions to which the signatures were affixed, leaving one formal petition, to which all the signatures would then appear to have been signed in the first instance.

If the presentation of the petition was made after this mutilation, I would not hesitate to hold, as has been already held in the Pembina and Oakland cases, ante, that no proper petition was presented. But, finding as I do that the presentation was made prior to the mutilation, it remains to determine whether the petitions as originally presented were sufficient.

In pasting the different lists of signatures or sheets together, one of them was pasted over a petition written in the Ruthenian language, a translation of which is in the following words: "Petition—We ratepayers undersigned on the bottom belonging to the Rockwood municipality protest against establishing hotel or saloon around Teulon. Undersigned as follows:" This is not addressed to any one, and

cannot seriously be considered by the most zealous in the cause they advocate as being a petition to vote upon a local option by-law. Another of the headings to a number of signatures is not addressed to any municipality, and in consequence it is not a petition; and I do not take it to be the function or within the province of the Courts to cure defects and create this into a petition, although presumably such was intended.

Striking out the names affixed to these imperfect petitions, if such they can be called, would, I believe, leave the petition short of the 25 per cent. of the ratepayers required to make it effective. But it cannot definitely be ascertained what number of names were affixed to the defective petitions, and, as the person presenting them was responsible for their mutilation, making this impossible, I think it must be held that everything will be presumed in odium spoliatoris, and that there are not a sufficient number of signatures to uphold the petition under sec. 62 of the Liquor License Act. The proceedings are statutory, and the provisions of the statute must be followed to the letter to give a municipality jurisdiction to act.

Following the judgments in the Oakland and Pembina cases, I grant the injunction.

MANITOBA.

MACDONALD, J. NOVEMBER 22ND, 1909.

TRIAL.

SALTMAN v. McCOLL.

Mortgage—Redemption—Real Property Act—Sale by Mortgagee under Power—Validity — Inadequacy of Price—Valid Contract of Sale—Default of Purchaser—Mortgagor Asking to Redeem before Registration of Transfer to Purchaser—Absence of Fraud—Regularity of Sale Proceedings.

Action for redemption of a mortgage under the Real Property Act, after mortgage sale proceedings and purchase thereunder.

G. W. Baker, for plaintiffs.

A. C. Galt, K.C., and E. F. Hughes, for defendants.

MACDONALD, J.:—The plaintiff Minnie Saltman was the owner of the lands mortgaged, and her husband and co-plaintiff joined in the mortgage, although having no interest in the lands therein described. The validity of the mortgage is admitted, as is also the regularity of the sale proceedings leading up to the purchase by the defendant McColl and the payment of the deposit called for by the conditions of sale and execution of an agreement of sale by the mortgagee and purchaser.

There are three main points argued: (1) that the property was disposed of at a gross undervalue; (2) that the purchaser made default in compliance with the further conditions of sale, and therefore is not entitled to as great consideration by a court of equity as is the mortgagor, as, the equities being equal, the first in point of time should prevail; (3) that the mortgagor, even were no case of hardship made, is entitled to redeem before the sale is completed by complying with the conditions of sale and by the registration of transfer and actual vesting of the property in the purchaser.

As to the first point, real estate expert witnesses differ as to the value of the property. I accept the value placed upon it by Mr. Christie, as the most likely to be within the mark. He places its value at $8,200 on a credit sale or $7,200 at a forced sale. What is meant by a forced sale I do not quite comprehend, unless it means a sale by an owner pressed by force of circumstances to sell at a sacrifice. If this is not a forced sale, then I cannot understand any sale to be more of a forced sale than a sale such as took place here, and a fair, honest, and properly conducted offer to public competition is, to my mind, the best means of ascertaining the market value of the property. A sale by public auction of a property valued at $7,200 for $4,850, I would not consider at a gross undervalue calling for the interference of a court of equity.

As to the second point: the fact that the purchaser made default in payment of the second instalment of purchase money and otherwise in carrying out the terms of the agreement, it is urged, entitles the mortgagor to a greater equity than that to which the purchaser is entitled. The property was purchased at a price of $4,850, and under the agreement

of sale 20 per cent. was to be paid (and was paid) immediately after the sale and the purchase completed on 25th October, 1909, in either of two following modes, one of which was the payment of the remainder in cash, which mode the purchaser decided to elect, and on 30th October a cheque was enclosed by the defendant McColl's solicitors in payment of such remainder, but, through some delay, unexplained, this cheque did not get into the hands of the solicitors having charge of the matter for the defendant company until 2nd November. I am satisfied, however, that this cheque was received in the office of the solicitors for the defendant company before that date, but on the 2nd November this action was brought, in consequence of which this cheque was returned to the solicitor for the defendant.

The agreement of sale was a binding and effective contract, and to hold otherwise would mean that contracts of this character would be of no avail if the property was under the Real Property Act, as a mortgagor coming in and redeeming would nullify such an agreement.

As to the third point: sec. 80. of ch. 148, R. S. M. 1902, provides as follows: "No words of limitation shall be necessary in any transfer of land in order to convey all or any title therein; but every transfer shall, when registered, operate as an absolute transfer of all such right and title as the transferor had therein at the time of its execution, unless a contrary intention be expressed in such transfer or instrument; but nothing herein contained shall preclude any transfer from operating by way of estoppel."

This section, counsel for the plaintiff compares in effect with sec. 63 of Act No. 1149 (1890) Vict. See Hogg's Australian Torrens System, p. 515: "No instrument until registered in manner herein provided shall be effectual to pass any estate or interest in any land under the operation of this Act, or to render such land liable to any mortgage or charge, but, on such registration, the estate or interest comprised in the instrument shall pass," &c. And this latter section, it is urged, received judicial interpretation in the case of National Bank of Australasia v. United Hand in Hand and Band of Hope Co., 4 App. Cas. 391; and it is contended on the authority of that case that a mortgagor may redeem, even after a sale by the mortgagee, at any time prior to the registration of his transfer.

A perusal of this case, however, reveals a condition of facts and circumstances very different from those existing here. In that case there was collusion and pretended and fictitious sales, through which title to the purchaser would have been perfected by registration of the transfer. There the agreement of sale between the mortgagee and the purchaser could not have been upheld, and a good title could not pass between the mortgagee and the purchaser through this agreement. But the registration of a transfer would, notwithstanding the invalidity of the agreement, pass a good and absolute title under the Act to the purchaser.

Here, however, there is no pretence at wrongdoing or irregularity on the part of the mortgagee. The mortgagor was in arrears under her mortgage. Demands had been made for payment of such arrears, and notice of exercising power of sale was served upon her. The property was duly advertised through the public press and by posters, and offered for sale by public auction in as public a manner as a sale could be held, and was knocked down to the defendant McColl, and an agreement of sale duly executed, and the deposit called for by the conditions of the sale paid.

It seems to me that this is as complete a sale as a Court can look upon, and, before such a sale can be set aside and the mortgagor allowed in to redeem, he must shew some special circumstances entitling him to do so.

In the Australian case cited the vendors had no title, and they could not convey any. They could only make title under sec. 301 of the Transfer of Land statute. They did not do so, and it was held that they could not effectually make a sale to the purchaser. Here the vendors were in a position to make an effectual sale, and did do so, and, in the absence of fraud or irregularity in the proceedings, the purchaser is entitled to become the registered owner.

I would dismiss the action with costs.

BRITISH COLUMBIA.

MORRISON, J. SEPTEMBER 15TH, 1909.

TRIAL.

NELSON v. NELSON.

Husband and Wife — Ante-nuptial Marriage Contract — Provision for Division of Trust Fund upon Separation— Public Policy—Appointment of Trustee.

Action by wife against husband, after she had left him, to enforce an ante-nuptial contract, clause 4 of which was as follows: "The trusts and purposes for which the said respective trust funds shall be held as hereinbefore mentioned are as follows: Upon trust to pay the income thereof to the said Hugh Nelson so long as the said parties shall live together as husband and wife. In case of the death of either party, in trust for the survivor absolutely, and in case, for any reason whatsoever, the parties shall cease to cohabit, then upon trust to sell and convert the said trust property and to hold one-half of the proceeds of such sale and conversion upon such trusts as may be agreed upon between the parties for the children of the said marriage (if any), and to divide the other half of the said proceeds between the said parties equally, and if there shall be no such child or children, then to divide the proceeds of such sale and conversion between the parties equally."

The defendant also joined in an instrument creating the plaintiff a joint tenant with him in his real estate, which was duly registered.

A. D. Taylor, K.C., for plaintiff.

F. M. MacLeod, for defendant.

MORRISON, J.:—I have reserved judgment herein in the hope that the parties might come together, as I still think they should have done.

The point involved in this case is whether an ante-nuptial agreement is void, as being against public policy, which in terms confers rights in property on the intended wife in the event of marriage taking place, subject to a provision

varying those rights favourably to the wife if a separation, for any reason whatever, should take place.

The plaintiff before her marriage to the defendant was a widow who recently had arrived from England, and was ensconced in rather snug quarters in Seymour street. She read an advertisement by the defendant in one of the evening papers, soliciting the services of a housekeeper. In response to this general invitation, she called upon him at his residence in Fairview. The outcome of this call and an interchange of visits, affording frequent opportunities of mutual inspection, was an agreement by way of settlement on their intended marriage, which is the agreement in question. The plaintiff declined to enter into the marriage unless this settlement was first made, and, after some hesitation, the defendant agreed. He is an old man, not in good health, and cannot be said to be prepossessing. He lived alone and was anxious for a companion. He admitted that what he really wanted was not a housekeeper but a wife, and told the plaintiff so at the time. She, on the other hand, is not old, and is of a healthy, prepossessing appearance. They are obviously ill-matched in appearance, and, from her admission at any rate, they are decidedly so in dispositions. Trouble arose immediately, whether due to her actions or his, or both, is the perplexing problem arising out of the sordid narrative. But, from the way in which the pleadings are shaped, I do not consider it necessary to attempt its solution here. The plaintiff in a short time left her husband's bed and board, and refuses to return.

The ground of the defence is that the action is not maintainable, for the reason that the agreement is wholly void as being against public policy. I agree with this contention. In my opinion, having regard to all the circumstances as disclosed at the trial, the agreement is one enuring to the benefit of the plaintiff upon their separation. The plaintiff left the defendant without his approbation or consent, and without those substantial reasons which usually justify such a serious step. In Lily Duchess of Marlborough v. Duke of Marlborough, [1901] 1 Ch. 171, Rigby, L.J., holds that, if the parties to a marriage settlement choose to bargain as to what should take place in the event of a future separation of the spouses, there can be no doubt that such a bargain is absolutely bad. The agreement in the case at bar contains on its face in terms a bargain of a nature which

has repeatedly been held to be contrary to the policy of the law: Cartwright v. Cartwright, 3 D. M. & G. 982; H. v. W., 3 K. & J. 382; Cocksidge v. Cocksidge, 14 Sim. 244; Egerton v. East Brownlow, 4 H. L. C. 160.

The cases cited by Mr. Taylor do not, in my opinion, assist him in his contention on behalf of the plaintiff, viz., Jodrell v. Jodrell, 15 L. J. Ch. 17, and Lord Rodney v. Chambers, 2 East 283, which are readily distinguishable.

Counsel for the plaintiff urged that in any event she is entitled to the appointment of a trustee during the lives of the parties. Well, for aught I know, they may be living together again in a most amicable way, as they should be. However that may be, holding the views I do of the evidence and the law involved, I cannot accede even to that request.

The action is dismissed without costs.

BRITISH COLUMBIA.

MORRISON, J. NOVEMBER 4TH, 1909.

TRIAL.

CAMPBELL v. NATIONAL CONSTRUCTION CO.

Cheque—Procurement by Misrepresentations — Indorsement to Third Person—Holder in Due Course—Value—Notice of Infirmity in Title—Bills of Exchange Act.

Action upon a cheque post-dated 1st November, 1908, for $2,663.59, made by the defendants, the National Construction Company, in favour of W. J. Cavanagh, who, at that time, was president of the company. It was alleged by the defendants that Cavanagh came to the other directors of the company stating he owed the city of Vancouver a large sum of money for taxes on lands, and that he had deposited a post-dated cheque for the payment of those taxes some time previously in order to save the discount, and that this cheque was either then past due or that the due date was imminent. He was said to have represented to the directors that, if they gave him a post-dated cheque, he could, by exhibiting it to the tax collector, secure further time for the payment of his taxes. He would return it

immediately. He also, it was alleged, assured the defendants, upon their objecting to comply with his request, that the use which he intended to make of it was a matter between himself and the tax collector.

The cheque was therefore on 10th October, 1908, given, Cavanagh signing it as president of the company, and, instead of utilising it as he represented he would, Cavanagh at once indorsed it over to the plaintiff, who also had been a director of the defendant company, and up to this time the confidential clerk of Cavanagh, holding his power of attorney. Cavanagh and he occupied a part of the same suite of offices, in a building in Pender street, as the defendant company. He had constant access to Cavanagh's books and those of the company. They likewise lived together. Cavanagh proceeded south next day, that is, the 11th October, beyond the jurisdiction—ostensibly for his health—where he was in a short period of time joined by the plaintiff, who secured a further indorsement on the same cheque. In the meantime, the defendants, hearing that Cavanagh had disappeared from the purlieu of Pender street, notified the bank to stop payment of the cheque, on the ground that it had been obtained by misrepresentation.

The cheque was duly presented, payment refused, and the usual proceedings for protest taken.

The plaintiff had become involved financially, as had also the defendant company.

In due course the case came on for trial; Cavanagh appeared at the hearing and gave evidence, being called by the defendants.

J. G. L. Abbott, for plaintiff.

A. D. Taylor, K.C., for defendants.

MORRISON, J. (after setting out the facts as above):—I am clearly of opinion, formed after hearing and seeing both the plaintiff and Cavanagh on the witness stand, that the cheque was obtained by means of a clumsy device formed between them to get a few thousand dollars which was not due them from the defendants, and which might, unfortunately, have succeeded, had not apparently some misunderstanding arisen afterwards as to their own affairs, leading to the conflict between them at the trial. I accept the defendants' evidence as to how Cavanagh got the cheque,

and I am satisfied that the plaintiff knew, before indorsement, how Cavanagh obtained it. It is contended that the plaintiff is a holder in due course. I do not agree. "A cheque is a bill of exchange drawn on a bank on demand:" sec. 165, Bills of Exchange Act. "A holder in due course is a holder who has taken a bill complete and regular on the face of it, under the following conditions, namely, (b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it:" sec. 56, Bills of Exchange Act.

This is exactly what, in my opinion, the plaintiff is not. In order to become a holder in due course he must have become a holder before receiving notice of defects: Russell on Bills, ed. of 1909, p. 210. And the learned author in his valuable treatise on the Bills of Exchange Act deals fully, at p. 205 et seq., with the definition of "good faith" and "notice."

I find that the plaintiff did not give value for the cheque, and that he had notice of the defect in Cavanagh's title—the breach of the special purpose for which it was given—before Cavanagh indorsed the cheque to him.

The action is dismissed with costs.

BRITISH COLUMBIA.

MORRISON, J. NOVEMBER 2ND, 1909.

CHAMBERS.

GOLDSTEIN v. VANCOUVER TIMBER AND TRADING CO.

Practice—Delay in Proceeding with Action—Order LXIV., Rule 13—Month's Notice of Intention to Proceed—Order to Amend Writ of Summons—"Step in the Proceedings."

The writ of summons was issued on 6th October, and appearance was entered on the 14th October, 1908.

On 18th June, 1909, an order was obtained by the plaintiff ex parte allowing him to amend the writ by adding to the indorsement a certain description of real estate referred

to. This order was duly entered, and the writ amended accordingly. But the order thus obtained was not served on the defendants, nor was the copy which was served amended pursuant to the order.

The plaintiff now applied, pursuant to a notice of application dated 18th October, 1909, for an order allowing him to add the liquidator of the defendant company as a party plaintiff and authorising him to proceed with the action as such liquidator.

Sir C. H. Tupper, K.C., for the plaintiff.

A. D. Taylor, K.C., for the defendants; objected that, as there has been no step in the proceedings for 12 months from the last proceeding in the action, therefore there should be a stay until the month's notice required by Order LXIV., Rule 13, should be first given.

MORRISON, J.:—The point arises whether obtaining the order for amendment of the writ ex parte in June, 1909, is a step in the proceedings. The case of Ochs v. Ochs, [1909] 2 Ch. 121, is the latest authority I can find on the point, in which the learned Judge deals with County Theatres and Hotels Ld. v. Knowles, [1902] 1 K. B. 480; Richardson v. Le Maitre, [1903] 2 Ch. 225. Lord Lindley says in Ives and Barken v. Willans, [1894] 2 Ch. 484, that the authorities shew that a step in the proceedings means something in the nature of an application to the Court, and not mere talk between solicitors' or solicitors' clerks, nor the writing of letters, but the taking of some step, such as issuing a summons or something of that kind, which is in the technical sense a step in the proceedings.

Leave obtained by the plaintiff to administer interrogatories, though got on a summons taken out by the defendant, and though no interrogatories were in fact delivered, was held in Chappell v. North, [1891] 2 Q. B. 252 (C.A.), to be a step in the proceedings.

I therefore hold that the obtaining of the order of 18th June, 1909, was a step in the proceedings, and that the 20 days' notice is not necessary.

BRITISH COLUMBIA.

MORRISON, J. NOVEMBER 8TH, 1909.

TRIAL.

WOODWARD v. CITY OF VANCOUVER.

Municipal Corporations—Sewers — Insufficiency — Overflow —Injury to Private Property—Liability.

Action for damages for injuries to plaintiff's property by the escape of water from the defendants' drains.

A. H. Macneill, K.C., for plaintiff.

W. A. MacDonald, K.C., for defendants.

MORRISON, J.:—The plaintiff's departmental stores occupy lot 16 in block 4, Old Granville townsite, in the city of Vancouver. About 17 years ago the corporation constructed a wooden basement drain for assembling the drainage of the lands at the corner of Abbott and Hastings streets, which included lot 16. This drain was afterwards extended over a greater area of drainage as the city grew, increasing the quantity of water brought through it without enlarging its capacity. Some time subsequently the defendants placed a manhole near the north-east corner of lot 16, cutting through this basement drain, and in the method of its construction reduced the capacity of the drain.

In the autumn of 1908, about 1st November, the woodwork of this drain, having become decayed, broke, and, the débris caused by this break getting into the drain, the flow of water was obstructed in its course by the alleged defects in construction. On the night of 3rd November, 1908, there was a heavy rainfall, and the drain received a large additional quantity of water and extra débris, which, meeting the obstruction aforesaid, was forced back through the plaintiff's basement drain, inundating the basement, in which were stored large quantities of perishable merchandise.

The plaintiff's basement drain was put in at the request, to the knowledge, and with the consent of the defendants. It was constantly open to their inspection, particularly during construction, and I find that the defendants adopted and approved of the action of the plaintiff in constructing it. I find that the defendants' drain, with which the plain-

tiff connected, was structurally defective, to the knowledge of the defendants, and the damage to the goods of the plaintiff was caused by the defendants' negligence in building said drain and maintaining it in its originally defective condition. I am not satisfied that there is any element of vis major here. The rainfall was not of such a nature as to relieve the defendants of responsibility on that ground.

It was further contended that the provisions of certain city by-laws were not complied with. I find that there was a substantial compliance with the requisite and usual requirements, and that the usual steps were taken by or on behalf of the plaintiff in respect to his basement drain. The city engineer's evidence satisfies me on that point. The statement of defence raises the point that the plaintiff failed to comply with the by-law relating to plumbing before proceeding to construct the drainage of the building. As I understand the case and the evidence adduced, the general drainage of the building is not involved, for, apparently, the closets, lavatories, etc., did not drain into this particular drain at all. In a drain of this particular kind, the city engineer states, if the street surface is not broken in its construction, a written permit is neither usual nor necessary.

I also find that the drain in Abbott street was the proper drain with which to connect, and not that on the lane north of plaintiff's buildings. It was strongly urged that the one circumstance that the plaintiff's drain did not contain a trap or flap to prevent a back flow of water is evidence of such a degree of negligence on the plaintiff's part as to disentitle him to relief. The judgment of Rose, J., in Welsh v. City of St. Catharines, 13 O. R. 369, 380, was cited as authority for this. But I apprehend that the learned Judge based his finding upon the particular facts of that case, where the basement drain was lower than the well from which the water backed up, and that it was an act of obvious precaution to place some contrivance to prevent a backflow, which must have been anticipated. Besides, in that case the drain in question was constructed under entirely different circumstances than, as I submit, exist here.

I think that the concluding portion of Lord Macnaghten's judgment in the Privy Council case of Hawthorn Corporation v. Kannluik, [1906] A. C. 108-9, is apposite here: "The municipal authorities might just as well pour this stuff directly on the plaintiffs' land. The damage to the

plaintiffs cannot be denied. It is nothing to the purpose, even if it be true, to say that the property in the plaintiffs' hands and in the hands of their predecessors in title was often flooded before the municipal authorities turned the watercourse into a public drain. Nor is it enough to prove that the work done in 1889 was sufficient at the time. It is insufficient now. It has been insufficient for some time past. The mischief grows as building increases, as new roads are made, new channels formed, and more and more of the surface becomes impervious to rainfall. It is not suggested that there is any real difficulty in remedying the mischief."

There will be judgment for the plaintiff for $8,485.65 with costs.

I disallow the estimate of $1,500 claimed by plaintiff for loss of Christmas trade.

BRITISH COLUMBIA.

MORRISON, J. NOVEMBER 9TH, 1909.

CHAMBERS.

RE KRUZ AND CROW'S NEST PASS COAL CO.

Security for Costs—Proceeding under the Workmen's Compensation Act pending before Arbitrator — Application to Judge in Chambers—Forum—Nominal and Insolvent Plaintiff—Administrator of Deceased Workman.

Application by the company, the respondents in a proceeding under the Workmen's Compensation Act, for an order for security for costs.

R. M. Macdonald, for the company.

C. W. Craig, for the applicant.

MORRISON, J.:—The applicant is the administrator of the personal estate of Albert Kruz, deceased, who died in consequence of injuries received whilst in the respondents' employment. The claim for compensation was in due course brought before an arbitrator pursuant to the provisions of the Workmen's Compensation Act, when the evidence was all substantially adduced with the exception of some documents from the respondents' side, for the production of

which an adjournment was granted. Further adjournments were also secured by the respondents to enable them to obtain a transcript of the proceedings for the purposes of their argument. Since proceedings commenced, the applicant has become an inmate of the penitentiary on a charge of theft. There is little doubt but that he is also insolvent.

Whilst the arbitrator is still seised with the consideration of the matter, an application is made in Chambers by the respondents for security for costs, on the grounds that the applicant is not interested in the subject matter of the arbitration; that the estate of the deceased is insolvent; that the applicant is under penal servitude; and that the dependent, wife of the deceased, lives beyond the jurisdiction.

The application is opposed, first, because it is contended that it should have been made to the arbitrator; secondly, because the right to security—if such right existed—has been waived, and Piper v. Burnett, 14 B. C. R. 209, is cited; thirdly, because, on the facts set forth, the respondents are not entitled to security as asked.

In the third objection is raised the substantial point of contention in answer to the respondents' real grounds, viz., the application of the well known principle of law that a nominal plaintiff, if without means, may be ordered to give security for the costs of the action.

Mr. R. M. Macdonald contends that an executor or administrator in proceedings under the Workmen's Compensation Act is not representing the estate of the deceased, but is distinctly representing the dependent (in this case the wife). and that, therefore, the principle of law above referred to applies. I do not agree. He has not satisfied me, as he must, that the applicant herein is merely nominal within the contemplation of that principle.

The case of Malcolm v. Hodgkinson, 8 Q. B. 209, cited on behalf of the respondents, contains a general statement in course of the argument by Blackburn, J., that, where an insolvent person is suing as trustee for another, it has long been the rule to require security for costs. But see White v. Butt (1909), 78 L. J. K. B. 65, where it is held that a plaintiff as trustee does not as such come within the rule. This case and the authorities referred to therein fully cover that phase of the application. In the present matter, the applicant is acting in an involuntary capacity, which differ-

entiates his position from the illustrations urged by Mr. Macdonald, in which the plaintiffs were, as Buckley, L.J., terms it in White v. Butt, supra, "fictitious." And the same learned Judge proceeds to give examples of the exceptions to the well established principle that a plaintiff cannot in a Court of first instance be called upon to give security for costs merely because he is poor, and he gives that of a plaintiff who is merely a bare trustee and is a pauper, the matter having been transferred to him for the purposes only of suit.

On the other points of objection, I think the application, if it could have been made at all, should have been made to the arbitrator, and then it should have been made in time.

The application is refused with costs.

BRITISH COLUMBIA.

MORRISON, J. NOVEMBER 10TH, 1909.

TRIAL.

WILSON v. KELLY.

Costs—Master and Servant—Injury to Servant—Action at Common Law with Claim under Workmen's Compensation Act—Failure of Action—Admission of Liability under Act—Disposition of Costs—Event—Discretion.

Action for damages for injuries sustained by plaintiff on or about 3rd June, 1908, while he was employed by defendants on Granite Island. He also claimed under the Employers' Liability Act and the Workmen's Compensation Act.

C. B. Macneill, K.C., for plaintiff.

C. W. Craig, for defendants.

MORRISON, J.:—The writ was issued on 16th October, 1908. Appearance was entered on 24th October. The pleadings were closed on 23rd November. A summons for directions was taken out on 11th December, and on 12th December the defendants filed an admission of liability under the Workmen's Compensation Act.

An application for particulars was made on 7th January, and on 6th April notice of trial was given for 20th April. On 15th April the defendants' solicitors wrote, in reference to their admission of liability, offering to pay at the rate of $10 per week. This offer was refused, and the case came on for trial on 20th April, when the action was dismissed, and compensation was assessed at the rate of $9 per week, after the second week. The plaintiff's rate of wages had been $18 per week. The question of costs having been reserved to be spoken to later, I now decide, under the circumstances peculiar to this case, that the defendants shall have the costs following the event upon the dismissal of the action. The plaintiff shall have the costs of an undefended proceeding under the Act, as estimated by the registrar.

Mr. Craig, for the defendants, very strongly urged that the discretion to deduct, from the compensation allowed, the costs which were caused by the plaintiff bringing this action, instead of proceeding under the Act, should be exercised to the extent of not allowing the plaintiff any costs at all.

The plaintiff undoubtedly had the right to pursue his alleged remedy at common law, and the legislature has stepped in and given him another chance should he fail in that pursuit. But it has not deprived the Court of the power to deal in its discretion with the costs of the action or that of proceedings under the Act in case the plaintiff fails.

If I understand Mr. Craig's contention, it is this, that in every case in which an action is dismissed the costs should follow the event, which he expresses as meaning that the plaintiff in no event outside of the action should be allowed any costs. I do not agree with that. I do not think the legislature intended that a club should be held over an employee's head when he came to decide as to what remedy he should seek. I do not admit, as has been contended, that, if employees discover they should not be deprived of costs, the Courts will become congested by compensation suits. It certainly should not tend to increase the number of accidents, and, as for the remedy, the Act is specific, that if a party fails in his action, still, if it is a case where he would succeed under the Act, he has his right to compensation, and, in my opinion, with such costs as the nature of the case admits.

BRITISH COLUMBIA.

MORRISON, J. NOVEMBER 12TH, 1909.

CHAMBERS.

REX v. PRASILOSKI.

Criminal Law—Habeas Corpus—Conviction by County Court Judge—Defendant Held pending Hearing of Reserved Case—Court of Appeal not Holding Session at Usual Time—Application for Discharge.

Motion, on the return of a habeas corpus, for an order for the discharge of the defendant from custody, in the circumstances stated in the judgment.

Ross and Woods, for the prisoner.

W. N. Bole, K.C., for the Crown.

MORRISON, J.:—It appears that the prisoner was properly before the trial Judge, that he elected to dispense with trial by jury, and that, on being arraigned, he pleaded to the charge, upon which he was then tried and found guilty. Instead of being sentenced then, the accused was legally remanded until 22nd November instant, pending an appeal on certain points of law arising on and out of the trial, reserved on the application of his counsel. The appeal was launched to come on for hearing on 2nd November instant, the date, pursuant to the local statute, upon which the Court of Appeal held its annual autumn session. The Court of Appeal did not sit then, nor has it held a session since. The ground, therefore, upon which counsel now urge the release of their client is, as appears in their notice of motion, "that justice and right have been denied the prisoner, for the reason that, having set down his appeal from a conviction of His Honour Judge Howay to the Court of Appeal of this province, he is unable to have the same heard, as there is no Court of Appeal now in existence under the statutes of the province of British Columbia, and no Judges have been appointed to sit in the Court of Appeal."

The only evidence upon which I could possibly proceed herein is that the Court of Appeal did not sit on 2nd Novem-

ber instant nor since. And I do not think that that is sufficient to justify my releasing the prisoner, who, from the material before me, appears to have been lawfully tried, and is legally detained. There is ample power to respite, and, for aught I know to the contrary, the subject matter of this appeal may be effectively disposed of before 22nd November instant.

Counsel admit that the material upon which they base their application is exceptional, and offered no authorities in support.

I do not think there will be any miscarriage either of law or justice by refusing the motion. Mr. Bole contended, by way of preliminary objection, that I have no jurisdiction to entertain this application, inasmuch as, the County Court Judge's Criminal Court being a court of record, its proceedings are not reviewable upon habeas corpus.

But, in view of the fact that counsel for the prisoner are not attacking the proceedings before or by the learned County Court Judge, but are relying upon the alleged reason set out in their motion, the objection is not apposite.

BRITISH COLUMBIA.

LAMPMAN, Co.C.J. NOVEMBER 16TH, 1909.

COUNTY COURT OF VICTORIA.

ANDREWS v. PACIFIC COAST COAL MINES LIMITED.

Master and Servant—Wages—Contract of Hiring—Monthly Hiring—Notice—Custom.

Action for wages.

C. Kemp, for plaintiff.

D. S. Tait, for defendants.

LAMPMAN, Co.C.J.:—The defendant company, who are in the unfortunate position of having made a contract through an agent who is now hostile, admit that plaintiff was employed by the month, but contend that he is not entitled to recover, because it is the custom amongst land

surveyors and their field assistants to terminate the employment at any time without notice, even though the hiring be a monthly one.

It cannot be contended that such a custom overrides an express contract, and, if any effect is given to Napier's evidence, there was in fact a conversation between the plaintiff and him, on the one side, and Collins (as the representative of the defendants), on the other side, in which Collins said that a month's notice would be necessary to terminate the employment. Neither Andrews nor Collins gave this version of the conversation, but it does not fit in at all badly with what they said, and it is very much the sort of conversation which one would suppose did take place, when once it is shewn that there was an express agreement that the hiring should be a monthly one; and the letters shew that. While the custom as stated may exist between surveyors and their assistants, it does not follow that the same custom would prevail in the case of a company engaging surveyors and their assistants.

The plaintiff claims $75, being the amount of wages for one month, and $30, being the amount he had to pay for board for the month following his discharge. From these amounts there should be deducted the amount the company paid the plaintiff for the 4 days in September, including the allowance for board, and also the $7 earned by the plaintiff in September. For the balance the plaintiff is entitled to judgment with costs. No costs should be allowed the plaintiff in connection with getting the evidence of Napier.

BRITISH COLUMBIA.

WILSON, Co. C.J. NOVEMBER 24TH, 1909.

COUNTY COURT OF EAST KOOTENAY.

BLUNDELL v. ANGLO-AMERICAN FIRE INSURANCE CO.

Costs—Scale of — County Court Action — Amount Involved between $500 and $1,000—Increased Counsel Fees—Rule 589.

Motion by plaintiff for a certificate for increased counsel fees.

A. I. Fisher, for the plaintiff.

L. P. Eckstein, for the defendants.

WILSON, Co.C.J.:—I have certified in writing that this action involved some difficult points of law, and that it was of general or public interest, and for those reasons I awarded costs on a higher scale as to counsel fees.

The amount involved in the action for which the plaintiff succeeded was $800. Marginal Rule 589 provides that "the Judge may award costs on any higher scale than that which would be otherwise applicable, to the plaintiff, on any amount recovered however small . . . provided that the Judge certifies in writing," etc.

As I say, I awarded higher counsel fees than those that could be taxed under the tariff for actions between $500 and $1,000. If the action had been for less than $500, or even for less than $100, I could have allowed costs under that Rule under scale C., the highest scale under the Rules. But the contention is raised that once the amount recovered exceeds $500, then I have no right to give any increased fee or allow costs on any increased scale; in other words, that the Rule means nothing in actions where more than $500 is recovered. The Rule we must construe as having some meaning. I think that in actions for over $500 an allowance, if thought fit by the Judge, of increased counsel fees, is only awarding costs on a higher scale than that which would be otherwise applicable. It would certainly, I think, be manifestly unfair in such a case as the present not to allow such increased costs. Here is a case involving important points of law, ably argued on both sides, lasting two days, and it seems to me to be a most apt case in which a broad view of the Rule should be taken.

Section 77 of the County Courts Act provides that as to any matters of practice or procedure (including costs) not specifically provided for by the Act and Rules, the Rules, procedure, and practice of the Supreme Court shall apply so far as, in the opinion of the Judge, the same shall be applicable; and, in my opinion, the practice as to increased counsel fees is applicable here.

I merely use that section of the Act to give what I think is a proper and reasonable construction to Rule 589 in so far as it affects actions for over $500 and the case at bar.

The point being new, there will be no costs.

ALBERTA.

BECK, J. OCTOBER 7TH, 1909.

CHAMBERS.

RE HYNDMAN.

Interpleader — Application by Stakeholder — Contract — Wager—Form of Order—Issue—Onus—Parties.

Application by A. W. Hyndman for an interpleader order.

C. J. Robert and William R. Evans deposited with Hyndman $1,250, $1,000 of which was furnished by Robert and $250 by Evans, to be held by Hyndman until after the determination of the question whether a certain horse in the possession of Robert was the same horse as described in the British Hackney Stud Book; the question to be decided by a report from a specified source; in the event of the report shewing that the horse was the horse so described, the whole $1,250 was to be paid to Robert, and if otherwise the whole sum to be paid to Evans. Evans claimed the whole $1,250. Robert did not claim the whole sum, but simply stated that Evans was not entitled to the $1,000 furnished by Robert, and notified Hyndman not to pay it over to Evans. Evans threatened to bring an action against Hyndman for the money, and Robert also laid claim as above.

In these circumstances Hyndman asked for an interpleader order.

H. H. Hyndman, for the applicant.

O. M. Biggar, for Robert.

J. M. Macdonald, for Evans.

BECK, J.:—I think I should grant the application for an interpleader order and direct an issue, the form of which I will settle. See Dowson v. Macfarlane, 81 L. T. 67.

I do not think I have sufficient before me to determine whether or not the contract in question is a contract of wager or not; the fact, if it be a fact, as seems probable, that Robert at least had an interest in the contract other than the sum or stake he would win or lose may prevent it from falling into that class, and it appears that parol evidence may be given to shew the whole facts. See Carlill v. Carbolic

Smoke Ball Co., [1892] 2 Q. B. 484, 490; affirmed [1893] 1 Q. B. 256.

I think the applicant should have his costs out of the fund, and the balance may be paid into Court to abide further order.

If the contract in question is a wagering contract, whether in respect of a thing legal or illegal, Robert is entitled to his deposit—which is all that is in question: if it is not a wagering contract, it lies upon Evans to shew that he is entitled. For these reasons Evans should be plaintiff. The issue will be whether Evans is entitled to the $1,000 deposit made by Robert under the agreement in question, notwithstanding Robert's notification to Hyndman not to pay the same to Evans. In other respects the order will be in the usual form.

ALBERTA.

STUART, J. NOVEMBER 17TH, 1909.

TRIAL.

REX FRUIT CO. v. ANDERSON.

Contract—Formation — Correspondence — Breach—Sale of Goods—Measure of Damages—Price at which Goods Obtainable—Freight Rate—Costs.

Action by purchasers for damages for non-delivery of potatoes in pursuance of a contract.

S. E. Bolton, for plaintiffs.

O. M. Biggar, for defendant.

STUART, J.:—In this case I have, after some consideration, arrived at the conclusion that the letters which passed between the plaintiffs and the defendant of the following dates, viz., 9th October, 1908, from the defendant to the plaintiffs, 13th October, 1908, from the plaintiffs to the defendant, and 22nd October, 1908, from the defendant to the plaintiffs, read in connection with the previous correspondence which passed between the parties, constituted a binding contract by which the defendant agreed to sell and deliver to the plaintiffs, free on board at Leduc, 3 car-loads of loose potatoes

at the price of 29 cents per bushel, delivery to be made within a reasonable time after 22nd October. The letter from the defendant to the plaintiffs of 26th October was, I think, an intimation to the plaintiffs that the defendant did not intend to carry out this contract, and I think it is on that date that the breach must be taken to have occurred. The result is that the plaintiffs are entitled to damages for non-delivery in accordance with the contract.

I am not satisfied, however, with the evidence presented by the plaintiffs with regard to the measure of damages. The plaintiffs came into the Alberta market, and I think they should have presented evidence to shew what the price of potatoes in car-load lots was at that time, either at Leduc, or, if the potatoes were not obtainable there at all, then at the nearest shipping point to Leduc at which potatoes could have been obtained. It did not appear from the evidence that the plaintiffs made any attempt to obtain the potatoes at Leduc or neighbouring shipping points, and the plaintiffs presented no evidence at the trial as to what price they would have had to pay for them at any of these points. I think it would be rather dangerous to accept the quotation at 80 cents a bushel which the plaintiffs say was the only one they could obtain and which was obtained from Brandon, Manitoba. They came into the Alberta market for the purchase of this commodity, and I think the measure of damages should be according to the price prevailing in Alberta. I do not think the plaintiffs were entitled to rest merely upon the defendant's assertion that they could not be obtained at Leduc. This was not, in my opinion, sufficient to relieve them from the obligation of taking the price prevailing either at Leduc or at the nearest shipping point to Leduc as the true measure of damages. They had been getting potatoes from other persons at Leduc, and I am satisfied from the evidence that it was possible to obtain them, if not at Leduc, then at any rate at some shipping point not very far distant.

The proper course, therefore, I think, is to refer the action to the clerk of the Court to ascertain the price at which potatoes could have been obtained on or about 26th October, 1908, in car-load lots, shipped loose in the car, either at Leduc, or, if they could not be obtained there, then at the nearest point to Leduc at which they could be obtained; and also to inquire and ascertain the freight

rate from the point at which they could be obtained to Moose Jaw. There is not sufficient in the evidence of either party to enable me to arrive at a decision upon this point myself, but I am satisfied that the evidence can be obtained, and thus the proper measure of damages arrived at, without much trouble.

Upon the clerk making his report, the plaintiff may move for judgment. As it may possibly turn out that no damages at all were suffered, the question of costs, of course, will be dealt with on that motion.

ALBERTA.

STUART, J. NOVEMBER 18TH, 1909.

TRIAL.

ST. GERMAIN v. RENEAULT.

Executors and Administrators—Lease of Hotel by Administratrix for Seven Years with Option of Purchase—Assignment—Registration—Land Titles Act, secs. 47, 54, 76, 135—Breach of Trust—Notice to Lessee—Option Clause Void—Effect of Registration—Expenditure by Lessee — Compensation—Administration Order—Costs.

The plaintiff was one of the next of kin of one Joseph D. Reneault, deceased. The defendant Eveline Reneault was the widow and administratrix of the estate of the deceased. The remaining defendants, except the defendant Lucien Boudreau, were the other next of kin interested in the estate of the deceased. Lucien Boudreau was the son-in-law of the deceased, being the husband of the defendant Marie Boudreau.

On 4th September, 1906, the defendant Lucien Boudreau was the lessee of certain property belonging to the estate, viz., lot 34, block 5, in the town of St. Albert, known as the Astoria Hotel, under a lease granted to him by the administratrix, which had at that date still 3 years to run, and which carried a rental of $85 per month. On the date named the administratrix granted to the defendant Lucien Bou-

dreau and one Simeon Cloutier a lease of the same property for a period of 7 years commencing at the expiration of the then current lease, at a monthly rental of $85 per month. This lease contained a clause granting to the lessees the privilege or option of purchasing the property in question, at any time during the currency of the term thereby granted, at the price of $7,000, payable $1,000 in cash and the remainder in 3 equal annual instalments, with interest at 8 per cent.

On 10th September, 1906, that is, 4 days after the execution of the second lease, Simeon Cloutier assigned all his interest in the lease to the defendant Lucien Boudreau. The lease was registered on 4th March, 1907, and the assignment on the same day.

Prior to the execution of this second lease the defendant Lucien Boudreau, as lessee and licensee of the hotel, had received notice from the license department that in order to retain his license further accommodation would have to be provided. Upon receiving this notice Boudreau told Mrs. Reneault that an addition would have to be built to the hotel or some arrangement made. It appeared that the estate was not in a position to make this expenditure, and Boudreau accordingly rented and afterwards bought an adjoining building. Before signing the lease in question Boudreau, as he stated, told Mrs. Reneault that he would have to spend $4,000 or $5,000 partly on one property and partly on the other. The lease was then signed, containing the option of purchase referred to. Boudreau afterwards spent, as he says, some $1,500 or $2,000 on the property belonging to the estate, and some $3,000 on the adjoining property which he had purchased.

The present action was begun on 8th September, 1909. In her statement of claim the plaintiff alleged that the administratrix had. in granting an option, committed a breach of trust, and asked for a declaration that the clause in the lease granting the option was void. She also alleged that the administratrix had omitted to collect the rent accrued to the extent of $756.50, and asked for judgment for that sum.

C. C. McCaul, K.C., and John Carnock, for plaintiff.

O. M. Biggar and Lucien Dubuc, for defendants.

STUART, J.:—At the commencement of the action the plaintiff was an infant. She sued by her friend Omer St. Germain, but no consent by the next friend was filed, although a consent had been in fact signed. At the opening of the trial counsel for Boudreau moved to dismiss the action because the consent had not been filed prior to the issue of the writ, relying on the case of Short v. Spence, 6 Terr. L. R. 267. In answer to this counsel for the plaintiff produced an affidavit shewing that the plaintiff had since come of age and had consented to and adopted the action, and these were filed with the clerk. On account of this circumstance I allowed the case to proceed.

By agreement of counsel the claim for judgment for $756.50 was dropped, and an order was made for the administration of the estate as if the action had been properly framed in the first instance as an administration action.

The case then proceeded with respect to the declaration asked for as against Boudreau, that the option clause in the lease was void.

Counsel for the plaintiff relied upon the case of Oceanic Steam Navigation Co. v. Sutherberry, 16 Ch. D. 236.

In answer to this case the defendant relies upon the provisions of the Land Titles Act, particularly secs. 47, 54, 76, and 135.

Section 47 says: "No memorandum or entry shall be made upon a certificate of title or upon the duplicate thereof of any notice of trusts, whether expressed, implied, or constructive; but the registrar shall treat any instrument containing any such notice as if there was no trust; and the trustee or trustees therein named shall be deemed to be the absolute and beneficial owners of the land for the purposes of this Act."

In view of the special provisions of sec. 76, it does not appear to me that this section is intended to refer to the case of an executor or administrator who is registered as such under the provisions of sec. 74, referring to the transmission of land of a deceased owner.

Section 76 says: "Any person registered in place of a deceased owner shall hold the land in respect of which he is registered upon the trusts and for the purposes to which the same is applicable by this Act or by-law, and subject to any trusts and equities upon which the deceased owner held the same; but for the purpose of any registered deal-

ings with such land he shall be deemed to be the absolute and beneficial owner thereof."

Section 54, in so far as it is material, merely states that an option of purchase may be inserted in a registered lease.

Section 135 says: "Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer, mortgage, incumbrance, or lease, from the owner of any land for which a certificate of title has been granted, shall be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered, or to see to the application of the purchase money or of any part thereof, nor shall he be affected by notice, direct, implied, or constructive, of any trust or unregistered interest in the land, any rule of law or equity to the contrary notwithstanding; and the knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud."

Were it not for these provisions, it would be quite clear that the case of Oceanic Steam Navigation Co. v. Sutherberry would prevent the defendant Boudreau from enforcing his right to purchase in an action for specific performance. The present action, of course, is not one by the lessee for specific performance of the agreement to sell, as was the case cited. But it will be convenient, I think, to look at the matter for the moment from that point of view. The Court of Appeal there decided that a court of equity will not force an administrator specifically to perform a contract entered into by him, the making of which constitutes in itself a breach of trust; that is, the administrator will not be forced to carry out his breach of trust by the application of the equitable remedy of specific performance. Looking at the matter from that point of view, the necessary inquiry arises whether, in view of the provisions of sec. 135 of the Land Titles Act which I have quoted, it can make any difference whether the lessee, seeking to enforce the option against the administrator, had or had not notice of the trust. In the judgments delivered by the Judges of the Court of Appeal the question of notice is not raised at all, although it would appear from the judgment of the Vice-Chancellor appealed from, that the lessees had at least indirect notice of the trust. But the final judgment in ap-

peal does not seem to turn in any way upon the question of notice. Indeed, as long as the contract remains executory, it is difficult to see what difference it can possibly make that the lessee may have had no notice of the trust or of the breach of it. The principle simply is this, that a court of equity will not enforce the purely equitable remedy of specific performance so as to make a trustee carry out a breach of trust. In the present instance, even assuming that Boudreau had notified the administratrix of his having accepted the option, the contract would still have remained purely executory. The facts that the lease has been enjoyed for a short time, and that the lessee has spent money on the property, would not, I think, alter the executory character of the separate contract of sale. Whatever might have been Boudreau's position if he had paid his purchase money before securing a transfer, it seems to me that, just as the expenditure of money on the property did not avail the lessees in the case referred to, so here it cannot avail Boudreau so as to entitle him to say, "I had no notice of the trust by which I can be affected, owing to the statute, and therefore I can ask the Court, in the exercise of its equitable jurisdiction, to enforce a breach of that trust." I can quite understand that it might be contended that the contract contained in the lease was one indivisible contract, and that since the property was enjoyed under it and the rent paid the contract was no longer executory. Even granting this, I cannot see that under the decision in the Sutherberry case there should be a decree for specific performance of the breach of trust. This remedy is discretionary, and I think the Court will refuse it in such a case and let the purchaser take his remdy in damages if there exists a binding contract at all.

In Fry on Specific Performance, paragraphs 407 and 408, this principle is clearly defined, and a number of cases are cited in none of which is it even suggested that want of notice of the breach of trust on the part of the plaintiff would make any difference.

The action, however, is not by Boudreau for specific performance, but by one of the beneficiaries interested in the estate, asking that the option clause be declared null and void. But there can surely be no doubt that an administrator has no power at all to make a contract binding upon the estate which of itself involves a breach of trust. Not

merely will specific performance be refused, but an action of damages against the administrator as such will also not lie, simply because the contract is one which he had no power to make, and which is therefore not binding on the estate, whatever the other party's rights might be against the administrator personally. Here again, I think, it is plain that want of notice can make no difference whatever. So far, therefore, as sec. 135 of the Land Titles Act is concerned, it can furnish no defence in the present instance.

There remains to be considered, however, the question what effect the provisions of sec. 76, already quoted, must have upon the position of the parties. The case must, I think, ultimately turn upon the proper interpretation and application to the facts of the words, "but for the purpose of any registered dealings with such land he (i.e., the executor or administrator) shall be deemed to be the absolute and beneficial owner thereof." What is meant by the expression "registered dealings with such land," and by the expression "for the purpose of?"

It is quite clear from what I have already said that, if Boudreau had been the sole lessee in the first instance, and therefore the only person interested in the option, he would not, at least at any time before the registration of his lease, have been entitled to say that the clause giving the option was valid and effective in his favour. Up to that time, that is, up to the registration of his lease, there would have been no "registered dealings" with the land at all. Can it, then, be said that by merely registering his lease in the land titles office he can make a clause in it, which before was void, valid and binding in his favour? I feel quite sure that such is not the intention or result of the enactment in question. The purpose of the registration law is to protect people who find instruments registered or not registered, and who act upon the faith of such registration or non-registration, and not to enable a person who is a grantee under an invalid instrument to turn it into a valid one in his own interest merely by the registration of it.

As against Boudreau as a sole lessee, the clause in the lease would have been void ab initio. As regards him, the administratrix could not be deemed the absolute and beneficial owner of the land, because the dealings between him and the administratrix were not "registered dealings" at all until he, by his own act only, had made them so. It may

indeed be the case that a person purchasing the lease from Boudreau after it had been registered, a person finding it so registered and containing that clause, and acting upon the faith of such registration, would be entitled to claim the benefit of the section and to say that for the purposes of this registered lease with the option clause contained in it, the administratrix must, in his (the purchaser's) favour, be deemed the absolute and beneficial owner of the land, and so fully competent to grant the option. It is, however, to my mind plain enough that, were the facts as I have for the moment assumed them, Boudreau himself would be in no position to take advantage of the enactment, simply because, as I interpret it, the section was not intended to have, and does not have, any such result.

The facts, however, are slightly but not, I think, essentially different. The lease of 4th September, 1906, was given by the administratrix not to Boudreau alone, but to Boudreau and Cloutier. Cloutier assigned his interest apparently, as far as the evidence goes, for $1, on 10th September, 1906, to Boudreau. Neither the lease nor the assignment was registered until 4th March, 1907. Boudreau had thus acquired the whole interest in the lease before any registration had taken place.

For the reasons I have given, I do not think the provisions of sec. 76 can, in this state of fact, furnish to him any defence, and the result is that the option clause was and still is null and void and must be so declared.

In arriving at this conclusion I have been quite uninfluenced by any consideration of the benefit or advantage to the estate of the bargain which was made or of the special relations existing between Boudreau and the administratrix. I am not at all convinced that the bargain was essentially disadvantageous or that Boudreau acted otherwise than in perfect good faith in advising Mrs. Reneault as he did, believing it to be the best interest of the estate that she should enter into the arrangement. All this has, however, nothing to do with the legal position of the option clause, according to the decision in Oceanic Steam Navigation Co. v. Sutherberry.

With respect to the expenditure made by Boudreau upon the property, it may be that a way may be discovered of securing compensation, either from the estate or from Mrs. Reneault's share of it, but it is quite clear from the Suther-

berry case that it can make no difference in regard to the validity of the option. See also Willmott v. Barber, 15 Ch. D. 96.

No question was raised by the defendant Boudreau as to his right to have the whole lease rescinded in case the option clause were held to be void. This point does not seem to have been suggested in the Sutherberry case, and there is no reason, as the matter was presented to me, why I should further consider it.

Boudreau should, I think, pay the plaintiff the costs of this action so far as they are referable to the point contested at the trial. The costs of the administration order will, of course, be reserved. The general costs of the action will be as in the administration action, and Boudreau will be liable to the plaintiff only for such additional costs as may have been caused by the claim against him.

ALBERTA.

STUART, J. NOVEMBER 19TH, 1909.

TRIAL.

BROX v. EDMONTON YUKON AND PACIFIC R. W. CO.

Damages—Railway—Removal of Fence—Neglect to Rebuild —Animals Pasturing on Unfenced Land—Destruction of Crop—Measure of Damages—Difference between Probable and Actual Yield—Duty of Land Owner to Mitigate Damages — Trespass — Entry on Land — Agreement — Value of Land—Expropriation.

The plaintiff was a farmer and the owner of the south-east quarter of section 34, township 52, range 27, west of the 4th meridian. The defendants constructed their line of railway along the northern boundary of this land, and in doing so removed the fence which had been placed there by the plaintiff. The defendants omitted to construct a new fence between their right of way and the plaintiff's land, and at various times in the spring and summer of 1907 a number of cattle, some few of them the plaintiff's own, got in upon the plaintiff's land owing to the absence of this

fence, and pastured upon a crop of oats and a crop of wheat which the plaintiff had sown. The fence was in fact constructed and completed by 20th August.

The plaintiff sued for the damages thus caused to his crop, and also for damages for trespass by the defendants entering upon and building their railway upon a portion of the plaintiff's land.

The defendants admitted their liability for damages in respect of the crop, and the only question was as to the amount of damages which should be assessed.

H. H. Parlee, for the plaintiff, contended that he had a right to shew, first, what amount of grain he actually gathered from the land and its actual value; and, secondly, what the amount and value of the crop most probably would have been had no damage occurred by the entry of the cattle; and that the difference in these two amounts was the true measure of damage in the circumstances.

O. M. Biggar, for the defendants, contended that the plaintiff should have taken either one of two courses, either he should have himself built the fence and then claimed merely for the cost of its construction, or he should have omitted to sow his crop at all and claimed merely for the rental value of the land during that season.

STUART, J.:—As I intimated during the argument, it seems to me that neither of the defendants' contentions can be supported. The rule, no doubt, is that, where a party is damaged by the wrongful act or omission of another, he is bound to do what he reasonably may be expected to do in order to mitigate the damages; but I do not think that the plaintiff here could have been reasonably expected either to build the fence or to let his land lie idle. The obligation or duty of the defendant company was a continuing one, and the plaintiff was, in my opinion, perfectly entitled to assume all along that the company would proceed on any next following day to fulfil their duty and build the fence. Supposing the plaintiff had waited until his grain was beginning to sprout up through the ground, and had then, in order to protect his crop from harm, purchased and secured material and had hauled it on the ground, and had found on his arrival that the defendants' servants were there on the ground that morning with their material prepared to construct the fence. Could the plaintiff have recovered for his

trouble? Would not the defendants have answered in such case: "What were you worrying about? We always intended to build the fence as soon as you needed it, as soon as it was necessary to prevent harm, and we did in fact proceed to do so." I think it was clearly unreasonable to expect the plaintiff to construct the fence himself in the circumstances. This, I think, is the effect of the decision of Mr. Justice Harvey in the case of Winterburn Farm Co. v. Edmonton Yukon and Pacific R. W. Co., 7 W. L. R. 801, which was affirmed on appeal, though this particular point was not discussed in the judgment rendered on the appeal.

Similarly, I think it is absurd to contend that the plaintiff should have let his land lie idle and then have sued for the rental value for the year. In what position would the plaintiff have found himself, had he allowed the seeding season to go by, and then, when it was too late to get any benefit from the land, but not too late to have furnished protection to a growing crop, the defendants had come on and erected the fence? Would not the defendants then have said, "You were entitled to rely upon our fulfilling our obligations, and you should have so relied"?

The only point upon which I have had any doubt is one which I raised during the examination of the plaintiff. I inquired whether he could not have done something in the way of driving the cattle off or by keeping a watchman on guard. It does not appear from the evidence that he ever made any attempt to drive the cattle off, even when he saw them pasturing upon his crop. Now, it is quite clear to me that where cattle get upon a farmer's grain owing to the default of an adjoining farmer in connection with the maintenance of a fence, the farmer injured would not be entitled to sit by and witness the destruction of his property, without making any reasonable attempt to prevent it, and then sue for the whole damages suffered; and this quite aside from the provisions of the Fence Ordinance, which give him the right to repair the fence himself and recover the cost from his neighbour. He should do what he reasonably can do in the circumstances to prevent the increase of the damages. If he could, without great inconvenience to himself, drive the cattle out, he should do so, and he would be recompensed in damages for his trouble. In the present instance, however, the plaintiff does not appear to have been residing on the land in question. It is clear

that the cattle could enter and probably did enter during the night and at other times when the plaintiff was not present to observe them. If at any of the times when he did observe them he had driven them off, they would most probably have immediately returned when he went away. Clearly the one thing he could have done was to have placed a watchman there both day and night to guard his land, but I do not think he could reasonably be expected to take this course.

The result is that the measure of damages contended for by the plaintiff is the proper one.

Some question was raised as to part of the cattle belonging to the plaintiff himself. I do not see that this makes the slightest difference. I think, in the absence of evidence to the contrary, I must assume that the plaintiff's cattle as well as the other cattle which entered had a right to be where they were before they came upon the plaintiff's land. The defendants were bound to erect a fence which would keep all cattle out, the plaintiff's own as well as others. They did not do so, and are surely liable for the resulting damage, even though some of it may have been caused by the animals of the plaintiff himself.

There is great difficulty in arriving at the proper amount of damages. It is so extremely difficult to say what the result would have been if the animals had never pastured on the land. There are the uncertainties of the weather, danger from frost and so forth, the uncertainties arising from the nature of the soil and the method of husbandry. I have to arrive at a conclusion from mere estimates and expressions of opinion as to the general result of such crops in the neighbourhood, where no damage from animals occurred. I have made, upon the evidence, the best estimate I can, allowing for cost of threshing and also for the fact that the plaintiff was put to no trouble for marketing grain which he never reaped.

Taking everything into consideration, I think the sum of $500 is a reasonable and fair estimate of the damage suffered, and there will be judgment for that amount.

The plaintiff also sues for damages for trespass. The defendants in the year 1906 entered upon a portion of the plaintiff's land, amounting to 5.95 acres; constructed their railway upon it, and have since been occupying the land and

operating their railway thereon. The plaintiff now claims the whole value of the land as damages.

It is somewhat difficult to see how the plaintiff can succeed on such a claim. Of course he can succeed to this extent, that he is entitled to the rental value of the land up to date of judgment. The defendants attempted to excuse their trespass by proving an agreement signed by the plaintiff to sell to the Canadian Northern Railway Company such portion of his land as might be required for railway purposes, and the plaintiff raised no objection as to the distinction between that company and the defendants. But, aside from this objection, the agreement does not give any right of possession whatever. The defendants are liable in damages for their trespass. But are they therefore trespassers and liable for the full present value of the land, even aside from the plaintiff's agreement in 1905 to sell at $10 an acre? The difficulty is that the plaintiff has not asked for an injunction, which he would quite obviously have been entitled to, unless the defendants should undertake to acquire title in the proper way. As the matter stands, however, the defendants have practically taken the land out of the plaintiff's possession. Presumably they intend to keep it. They have taken possession of it absolutely, without any legal authority, so far as the evidence goes. How can they now defend their action by presenting a very vague agreement to sell, which does not specify the amount of land to be sold, and which was executed in 1905? And how can they assert that the amount per acre at which he agreed to sell this undefined quantity in 1905 is the value of the land to him in 1909? The defendants never took any steps under the Act to acquire title to the land. They never, so far as the evidence shews, asked for a conveyance or sought specific performance of the agreement. In these circumstances, I think the plaintiff is not bound by the price he put upon the land in 1905. There is nothing before me to shew even that this premature agreement is binding upon the plaintiff under the Railway Act. The proper judgment should therefore be, in my view, that unless the defendants proceed within 15 days to acquire title to the land under the Railway Act the plaintiff should have judgment for the sum of $238, being the value of the 5.95 acres at $40 an acre, the price sworn by the plaintiff to be a reasonable price at the present time, which was not disputed, such sum to be paid into

Court by the defendants or by the sheriff, if levied under execution, and paid out to the plaintiff upon his execution of a proper transfer giving good title.

The plaintiff should have leave, at any time after the service of notice to expropriate, to move for entry of judgment for the sum mentioned, on the ground of delay in proceeding with the expropriation. The defendants did not counterclaim for specific performance of the agreement of sale, as they might have done, and therefore the bringing of an action of specific performance by them to enforce the agreement is not to be considered as such a commencement of proceedings as will effect a stay of the judgment for the sum mentioned.

The plaintiff will have his costs of the action.

SASKATCHEWAN.

WETMORE, C.J. NOVEMBER 12TH, 1909.

CHAMBERS.

RE OUTLOOK HOTEL CO. LIMITED.

Company — Winding-up — Petition for Order—Practice—Dominion Winding-up Act—Statutory Requirements — Affidavit Verifying Petition — English Rules — North-West Territories Rules — Proof of Insolvency — Admissions of Servants — Acknowledgment of Company — Amendment of Petition.

Application on behalf of Marshall A. Lougheed, under the Dominion Winding-up Act, R. S. C. 1906 ch. 144, for a winding-up order against the company.

W. B. Scott, Regina, for the applicant.

A. Leahy, Regina, for the company.

WETMORE, C.J.:—The petition is not dated, but the affidavit of the petitioner, purporting to verify the facts set forth in it, was sworn on the 4th October last, and a copy of this affidavit was served on the president of the company with the petition and the notice of application. The fact that the petition was not dated is therefore immaterial.

The petition sets forth: (1) how and when the company was incorporated; (2) where the head office is situate; (3) the object for which the company was incorporated; (4) the nominal capital stock, the number of shares into which it is divided, the number of shares subscribed for, as appears by the memorandum of association on file in the office of the Registrar of Joint Stock Companies for the province, and the ignorance of the petitioner as to how many shares have been subscribed for, and what amount has been called up; (5) that the company, immediately after incorporation, commenced to carry on business and continued to carry on business until the 4th October last; (6) that the petitioner is a creditor of the company for $1,547.47, which is overdue and unpaid, and that the company is indebted to other persons in large amounts which are overdue and unpaid; (7) that the company is unable to pay the petitioner's claim, or to meet its other liabilities, and that the company is insolvent, as has been admitted by the persons who are carrying on its business at the town of Outlook; and then follows the prayer that the company may be ordered to be wound up, &c.

The affidavit before referred to as purporting to verify the facts set forth in the petition, merely refers to the petition as an exhibit, and states "that such of the statements in the petition . . . as relate to my own acts and deeds are true, and such of the statements as relate to the acts and deeds of any other person or persons or body corporate I believe to be true."

I cannot find set out in the petition any "acts or deeds" of the deponent or of any other person or persons or body corporate, except as stated in the 5th paragraph, which I think would be the act of the company. All the other matters stated in such petition are facts, but not "acts or deeds;" and, in so far as the deponent is concerned, he states what is mentioned in such 5th paragraph as a fact, not as a deed or act of his. This affidavit, however, appears to be in the form prescribed by the Rules framed under the provisions of the Companies Act, 1862 (Imperial). See In re New Callao Co., 26 Sol. J. 403.

It is quite clear that the facts set forth in the petition require to be verified under oath, and I must say that I cannot understand how an affidavit in the form presented in England can, under very many circumstances, be applicable.

I am of opinion that I am not bound by the English Rules referred to, and I hold that the affidavit in question does not verify the facts set forth in the petition. The Rules and Orders under the Winding-up Act formulated by the Supreme Court of the North-West Territories on the 9th July, 1903, are in force and applicable to the Winding-up Act I am discussing, and the procedure to be taken thereunder.

Rule 47 provides that a copy of the petition, indorsed with or accompanied by the notice of the application, shall be served as therein prescribed.

Rule 48 provides that such notice shall mention the affidavits upon which the applicant intends to rely in support of his application, and that copies of such affidavits and other material, or of any portion thereof, shall be furnished to the advocate or any officer of the company requiring the same, within 24 hours after demand.

The notice served in this case stated that the affidavit to which I have referred would be read in support of the petition, and no other affidavit or material was mentioned. The service was effected on the 4th October; the notice stated that the petition would be presented on the 11th October. The matter was adjourned from time to time, and eventually was heard before me on the 8th November, when counsel for the applicant applied for leave to read 3 other affidavits, viz., of William Cornelius Kent, James Archibald Fraser, and Marshall A. Lougheed, respectively. Copies of these affidavits were served on the agents of the company on the 6th November. The last two affidavits were irregular. Counsel for the company stated that he would not object to these affidavits by reason of the irregularities, and he would consider that by the reference made by Fraser in his affidavit to "the above named company" he intended the Outlook Hotel Company, but he objected to the affidavit being now received to bolster up the applicant's case or to set up new grounds for the application.

Rule 52 of the Supreme Court of the North-West Territories is as follows: "Every such petition, and the affidavits and other material intended to be used in support thereof, shall, on or before the day of service of notice of the application for a winding-up order, be filed in the office of the clerk of the Court of the judicial district in which the head office of the company is situate, and, unless so filed, such petition,

affidavits, or material shall not be read or used upon the application without special leave of the Court or a Judge."

Of course, no one of those 3 affidavits was filed on or before the day of service of the notice of application. They were only served between the 25th October and the 4th November. Consequently, that Rule was not complied with, and, unless special leave is obtained from me to read these affidavits, the only material to support the application is the affidavit of the applicant, a copy of which was mentioned in the notice, and which I have held does not verify the facts set out in the petition. This affidavit so absolutely and entirely fails to verify the facts set forth in the petition, or any of them, that I am of opinion that leave to read the additional affidavits should not be allowed. As a matter of fact, on the day of service of the notice, there was not on file, as required by Rule 52, a scintilla of evidence to establish any one fact set forth in the petition. I therefore refuse to allow those affidavits to be read.

I will not, however, turn this case off on that ground alone. This company is a trading company, as defined by the Act, and was incorporated under the Territorial Companies Ordinance (ch. 20 of 1901), and, as held by me in Re Nelson Ford Lumber Co., 9 W. L. R. 438, applications can only be made against it under the Winding-up Act in question, when it can be brought under either par. (a) or (b) of sec. 6 of that Act. It is clear that par. (b) does not apply to the circumstances of this case. The proceedings, therefore, can only be sustained on the ground that the company is insolvent. Section 3 of the Act states when a company is deemed insolvent (of course under the Act).

In In re Wear Engine Works Co., L. R. 10 Ch. 188, James, L.J., dealing with similar provisions in an Imperial statute, lays it down at p. 191: "We wish it to be understood that a winding-up petition must allege facts which justify a winding-up order. No doubt, if there is any slip in the statements, the Court can allow an amendment, so that the real point may be tried; but, subject to this power of amendment, it is not enough for a sufficient case to be shewn in evidence; a sufficient case must be stated on the petition, that the order may be secundum allegata et probata."

It will not be sufficient to state generally in the petition that the company is insolvent. Facts must be stated which will bring the company within some one or more of the

provisions of sec. 3. The only paragraphs of the petition under which it can be set up that the case is brought within any of the provisions of that section, are paragraphs 6 and 7. I have, in effect, set out both of those paragraphs in a preceding part of this judgment, and they attempt to set up in the first place that the company is not able to pay its debts as they become due, and to bring it within clause (a) of sec. 3 of the Act. Section 4 provides that, when it shall be deemed that a company is unable to pay its debts as they become due, the creditor must serve a demand in writing on the company requiring it to pay the sum due, and if the company fails to pay the same or to secure or compound the same within the time prescribed by the section, it shall be deemed to be unable to pay its debts as they become due. Nothing of this sort appears in the petition. Par. 7 of the petition, however, alleges "that the said company is insolvent, as has been admitted by the persons who are carrying on the business, of the said company at the town of Outlook."

The attempt by this allegation is to bring the company within clause (d) of sec. 3, which is as follows: "If it has otherwise acknowledged its insolvency." That means if the company has otherwise acknowledged its insolvency.

Who are the three persons who have made this admission? Are they officers of the company, who are in a position as such to make admissions of such a character as to bind the company? Or are they persons who are merely put in the hotel by the company to manage it? If the latter, I am very clear that any admissions made by such persons would not amount to an acknowledgment of insolvency on the part of the company. And I am of opinion that admissions of insolvency by an officer of the company would not amount to such an acknowledgment by the company.

In In re Qu'Appelle Valley Farming Co. Ltd., 5 Man. L. R. 163, Taylor, C.J., at p. 164, dealing with an exactly similar clause in the Winding-up Act, ch. 129 of R. S. C. 1886, says: "It is, however, sought to bring them within clause (d), and it is urged that the company has acknowledged its insolvency, by not paying the debt, allowing itself to be sued, judgment to be recovered, and execution to be returned nulla bona. I do not think so. These are all circumstances from which perhaps a state of insolvency might

be inferred, but that is not what the statute means by acknowledging its insolvency. To bring a company within the clause, there must, I think, be something actively done by it as an acknowledgment. This seems plain from the clause, standing as it does immediately after two other clauses, saying a company is deemed insolvent if it calls a meeting of its creditors for the purpose of compounding with them, or if it exhibits a statement shewing its inability to meet its liabilities."

In In re Lake Winnipeg Co., 7 Man. L. R. 255, an affidavit made by the president of the company, who was the petitioner, was read, stating that "from his knowledge of the company's affairs he knows it to be unable to pay its debts in full." The learned Judge held that that was not sufficient evidence of insolvency (see p. 260 of that case). and I agree with him.

A fortiori then, a verbal admission made by the president or other officer of the company would not be evidence of insolvency under the Act. The acknowledgment contemplated by clause (d) of the section must be something ejusdem generis with what is required by clause (b) or clause (c) of the section.

Now, clearly, the affidavit of the applicant served with the petition, even supposing it verified the facts set out in such petition, carries the matter no further.

The further affidavit of the petitioner, Marshall, which was sought to be put in at the hearing, would be of no assistance. It merely verifies the indebtedness of the company to him, states that he has repeatedly asked the manager and other officers of the company for a settlement of his claims, and that these officers have stated that the company was unable to pay its debts in full. That does not comply with sec. 4 of the Act. The affidavit also stated that Mr. Marshall was present at a meeting of creditors of the company, when it was admitted by the manager and secretary of the company that the company was unable to meet its liabilities. He does not depose that a statement was exhibited by the company, as required by clause (c) of the section. The affidavit of Kent does not help the petitioner. He merely states that the company in question owes a company of which he is manager some rent and that a distress warrant was issued on the 2nd November, for its recovery,

and the amount has not been paid. If it is thought that this brings the case under the provisions of clause (h) of the section, all I have to say is that that clause refers to an execution, not a distress warrant, and, anyway, the issue of the warrant was after the service of the notice of this application. The 15 days from the date of seizure has not yet expired, and there is no evidence as to what time was fixed for the sale of the goods seized, if any seizure was made, which is left very doubtful.

Neither will Fraser's affidavit assist the petitioner. It is of the same character as the other affidavits. It alleges that he was present at two meetings of creditors, when the manager and secretary of the company admitted "that they" (I presume he means the company) "were unable to meet their liabilities." I have already dealt with allegations of this character. He alleges, however, that the company called a meeting of its creditors for the day of September, 1909, for the purpose of compounding with them. In the first place this is very vague. What day of September has he reference to? But the great objection to this is that it is something entirely new. It is not mentioned in any other affidavit, and there is not the slightest reference to it in the petition. As far as I know, it was not brought to the notice of the company until over a month after the petition and notice of application were served. I certainly would not, under such circumstances, if I had the power to do so, allow the petition to be amended to correspond with that allegation. I may add that I was not asked to amend the petition; neither will I receive this allegation to influence me in the conclusion I have reached. I am very much inclined to the opinion (although I do not decidedly lay it down) that an amendment should not be allowed in a case like this. There is not merely a "slip in the statements" as mentioned by James, L.J., in the citation I have made from his judgment. The proceedings are absolutely bad from the beginning. No case whatever was presented at the time of serving the petition and the notice.

Application dismissed with costs to be paid by the applicant.

YUKON TERRITORY.

CRAIG, J. OCTOBER 27TH, 1909.

TRIAL.

TAPOILA v. HARDING.

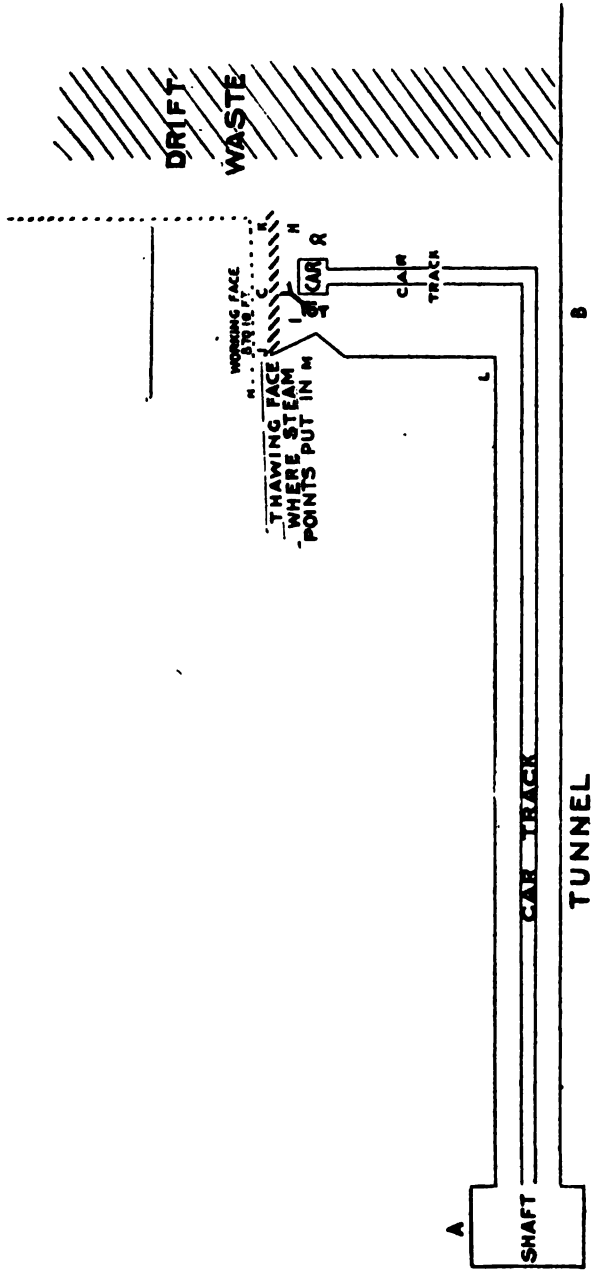
Master and Servant — Injury to Servant — Negligence — Contributory Negligence — Master's Knowledge of Danger — Servant's Knowledge — Taking Chances — Volenti non Fit Injuria.

Action by a miner working on a placer claim against the owners for damages for injury caused by their negligence, in the circumstances stated in the judgment.

George Black, for plaintiff.

Frank J. McDougal, for defendants.

CRAIG, J.:—The defendants are the owners of the placer mine in question, which is worked in the ordinary way in which placer claims are worked in this country—by drifting. The nature of the ground is sworn to be, on the surface, muck; below that, about 2 feet of frozen gravel and about 4 feet of what is known as frozen bedrock. It is in evidence that this material known as frozen bedrock is not really rock, but hardened material, which, after being thawed by steam points, becomes soft and friable, of less supporting consistency than gravel. It is also in evidence that between the layer of gravel and the frozen muck over it there is a very slight seam of sand. This claim was worked through a shaft and a tunnel shewn on the sketch which I annex to my judgment, the shaft being "A," the dirt being removed along


DRIFT
WASTE
WORKING FACE
THAWING FACE
WHERE STEAM
POINTS PUT IN
CAR
CAR TRACK
CAR TRACK
TUNNEL
SHAFT
A
B
C
H
I
L
M
R

the car-track from the drift "B-C." "J-K" represents the face of dirt at which the parties were working. The system was to drive in steam thawing points, which were about 8 to 9 feet in length, from the place marked "Drift" at right angles to the car-track running from "B" into the face, and, after thawing a considerable portion of the dirt, to fill in from the working face "J-K" to the car which is shewn on the sketch. The length of the face "J-K" is sworn to variously, the plaintiff asserting that it is 8 feet, the defendants, 9 to 10 feet; but it was 8 to 10 feet. On the day in question the plaintiff and one Larsen were working at the thawed ground, loading the car which one of the defendants would wheel out to the shaft. The other defendant was working in the rear of the plaintiff, and Larsen cleaning up the dirt left behind on bedrock. On going to work on the afternoon of that day the plaintiff and Larsen discovered that a large block of unfrozen gravel was either wholly resting on the top of the thawed ground or attached to the roof at the back and falling away from the roof. They called the attention of the defendant Harding to it and expressed their fears; he (Harding) took a candle, climbed up on the thawed face, and examined it. It is in evidence that he could make but a very imperfect examination, owing to the darkness, and could not see far back on to the slab; but he assured them that the slab was resting on the top of the thawed ground, and would, as the dirt was removed from beneath it, gradually sink to the floor of the drift and not cause any danger, and ordered them to go to work. The defendant Harding says he told them to work at the sides and remove the dirt away from the sides, and that this would allow the slab to settle down gradually. The plaintiff and Larsen deny any such specific instructions, but say they were told to go to work, and that there was no danger. After working for some time—the defendants swear an hour and a half—the plaintiff and Larsen say while one car was being filled and half another—a piece of the slab became detached, fell down, and seriously injured the plaintiff. This mine is worked, as I have already indicated, by thawing the ground up to the muck, which muck, being frozen, keeps a solid roof over the drift. What the defendants expected would naturally result from thawing would be that all the ground which was thawed, and only that, would come down and be loosened. They say in their evidence—and other witnesses also say—that oc-

casionally just such things as this do happen in mines, that a slab of frozen gravel will become detached from the roof and be a source of danger. We do not know in this case whether the slab when it fell from the roof was cracked and the piece which fell afterwards detached by a crack from the main body, or whether, the support of the thawed ground underneath being removed, it broke off by its own weight. So far as the defendants knew, it was just as likely that the slab was originally cracked as not. They say if the piece had not either been cracked or had not fallen off by its own weight, if the whole mass of the slab had remained intact, as they expected it would, then it would have settled down and no danger would have ensued; but that they did not anticipate either that it was cracked or that it would break off. After the assurance given by the defendant Harding that no danger would ensue, the plaintiff and Larsen continued their work filling into the car. The evidence is that a man could not with comfort stand erect in the drift, it being about 5 feet high or thereabouts; that in working at the face the men had to use both pick and shovel; that the shovels were shortened, about a foot being taken off the handles. The plaintiff and Larsen say this was because of the confined space in which they worked. The defendants say that it is usual to shorten shovels when working in drifts. The plaintiff also says that behind him, about 4 feet away, was a projection in the side of the wall, shewn at " M " in the sketch, which stuck out 2 or 3 feet, hemming him in more or less from the rear. The defendants deny any such projection being there. Larsen also swears to the existence of this projection. However this may be, giving the defendants the benefit of every inch of ground that they swear to, there could not have been more than 10 feet of face against which both Larsen and the plaintiff were working. The car which they were filling was shoved up to within about 3 feet of the face; the slab, which was the menacing thing, rested about the centre of the thawed face where I have marked the sketch with red pencil, and the men worked on both sides of the car. Allowing 2 feet for the car would just give the plaintiff, who was on the inside, 4 feet of space to work in, and it would be less if he was confined by the projection at "M," which he swears to. But, leaving that out of the question, he had, at the most, 4 feet; he himself says 3 to 3½ feet. This, it will be seen, is a very small space laterally

to work in, and not very much side to work on, even if I take the evidence of the defendants at its full value. While working he had to stoop down to handle his shovel or pick away the earth; the roof of the drift could not be distinctly seen, in fact, could hardly be seen at all, the drift being lighted by 3 candles only, one to each man. So that during the operation of filling the car it could not be seen what was taking place on the top of the thawed ground, or what action the frozen slab was taking in settling, and there is no evidence that from the time of the first inspection by Harding until the time of the accident any further inspection was made to see what progress was made or whether the danger was increasing or diminishing. The plaintiff and Larsen say they suggested that something should be done to remove the danger, but Harding said, "Leave it alone, it won't come down yet," and they did as they were told and went to work. They took their orders from the defendant Harding, who, having pushed the car away to inspect the slab, pushed it back for the work to be resumed. The plaintiff says he felt that he was working in a dangerous place. When first seen the slab was resting on the thawed ground, except, according to the evidence of the plaintiff, overhanging from 6 to 10 inches. The plaintiff made no request to be taken off the work, but simply went to work in the ordinary way. The plaintiff is a foreigner, who speaks very poor English, but he said he could understand considerable of what was being said between Larsen and the defendant Harding, and that he took his instructions from the defendants through Larsen, who spoke his language. Larsen confirms in almost every particular the evidence of the plaintiff. It was he who first saw the slab and directed the attention of Harding to it, and he told Harding that it ought to be taken down before it fell and hurt any one. Harding looked at it and said it would be all right, that it would not come down yet. He also says that his intention and the plaintiff's was to take it down gently, that being their first object and not the getting out of the dirt; that Harding stopped them taking down the slab. Both these witnesses swear that the piece fell "like a shot without warning." The evidence of the defendants Harding and Maynard differs very little in material points from the evidence of the plaintiff and Larsen, the main fact being this, that there was a slab which all parties regarded as being a source of possible danger; that, instead of removing the

danger by attacking it at once and dragging the slab down or breaking it up, the defendants ordered the men on to their work to fill the cars in the ordinary way, taking the chance that the slab would settle by its own weight gradually, as the soft dirt beneath it was removed. It is quite clear to me that the defendants, instead of spending an hour or two or even more in removing the cause of danger, went to work in the ordinary way to remove the dirt by the cars, hoping that no danger would ensue. Two of their own witnesses—Howig and Carstenson—swear that it would have been wise to have taken down the slab. Howig says: "I would try to get it down on the hard floor by removing the dirt from under it if there was room; would use dynamite if the slab on the roof not resting on the thawed bedrock; the way to do was to remove your gravel and dispose of it; I would set to get the slab safely down first." Carstenson says that he has seen such detached slabs falling from the roof and that it is quite common on Quartz Creek, but he would take it down by undermining or putting timber under it. He says further: "The manager should have seen that the slab was safely disposed of, and the disposal requires the careful attention of a practical miner. The first thing I would do would be to see that the slab was safely landed. I think, having the danger in mind, I would attend to the slab the first thing, and not proceed with my work in the ordinary way trusting to the slab coming down in safety." Hansen, another witness, says: "Such detached slabs are quite common; he would dig from under it and let it down; it would not be dangerous; it was an accident that a piece broke off;" and he would work in the ordinary way. On cross-examination he says it was an unexpected thing, and he could have felt it and examined it. It is argued that the defendants having given instructions to dig at the side, and that the plaintiff having come across in front of the slab, he was guilty of contributory negligence. There is no positive evidence that he was ordered to work at the side, and no positive evidence that he came forward in front of the slab. When picked up he was lying, as indicated on the sketch, with his feet in front of the car and his head to one side of it, that is, his head would be about 2 feet from the wall, and his feet projecting in front of the car. Reasoning from probability and from the facts and measurements, it is hard to see how a man could carry on the work he was ordered to

carry on and not move about somewhat in the space in which he was confined; at most, he only had 4 feet, hardly that. If the slab was 3 feet wide, that, taken off the 10 feet of face, would only allow 3½ feet at the side of the slab, and it is hard to indicate what would be the side of the slab, because the whole face was in a line, and the plaintiff was certainly on one side confined by a solid wall; he could only spring to the rear to be out of danger. So that it would not matter, it seems to me, his working backwards and forwards in front of the slab, and his springing to the rear could only be done if he had some warning of the impending danger. If he could have worked so far away to the side that a piece in falling off would in falling have given him warning, then he might have avoided the danger; but he could not do that. Four feet away is no distance at all to avoid an object falling from that height.

The evidence, I think, establishes this, that all parties regarded the frozen slab as dangerous, that is, that danger might ensue from it; that the defendants assumed that the slab was a solid body, and that it would settle down quietly; that they took no precautions whatever to attack the impending danger and guard against any possibility of the slab falling suddenly; that they went on with their ordinary work, hoping for the best, in reality taking some chances; that there was no contributory negligence on the part of the plaintiff; and the only questions to be considered are whether he was volens in this, that when the impending danger arose he voluntarily assumed the risk himself, thereby releasing the employer, or whether such a thing is the ordinary daily incident of his labour, that is, before he entered upon his occupation he anticipated just such dangers and accidents as arise in this case. The difficulty in a case of this kind is not so much to ascertain what the law is, as to apply the rules and principles laid down in the various authorities to the circumstances as they arise.

I considered a very similar case of Elliott v. Mackinson, in 1903, where a similar slab was attached to the roof over the workmen wheeling on a track, and afterwards broke away, injuring one of the men. This case differs slightly from that, in that the danger there was imminent, and that the workmen moved, as they thought, out of the danger zone, but not far enough. In this case that I am considering there was no moving away from the danger zone, unless the

direction to work at the side might be considered such, and there was no attempt made to remove the cause of the danger. In this case, as in that, the defendants contend that, as a matter of law, they are not liable; the workman knew of the danger into which he was running, and took upon himself that risk; that the maxim "volenti non fit injuria" applies; that there was both the "scienter" and the "volens."

Up to the time of the judgment of the House of Lords in Smith v. Baker, [1891] A. C. 325, the law seemed to be pretty well established that when the workman was aware of the risk which he was running and took upon himself that risk or continued to work knowing of the risk which he was running, the maxim applied, and no liability attached to the employer for any accident happening thereafter. But Smith v. Baker is the last word upon the matter, and is the authority under which we must proceed if one can determine what Smith v. Baker decides. There were cases prior to Smith v. Baker which were not in accord with the recognised law that knowledge was "volens."

The strongest case on that point which I can find is the case of Weblin v. Ballard, 17 Q. B. D. 122. This was the case of a person employed in a brewery, in the engine room; at some distance from the floor was a valve to turn on steam to a tank of the engine. The valve was only reached by means of a ladder placed against the lower pipe, but by reason of a bend in the last-mentioned pipe the ladder (though in itself perfect), being without hooks or stays, was unsafe for the purpose. The defendant had himself seen the ladder so used; and he was found dead in the engine-room, apparently killed by the ladder slipping while he was upon it. In that case A. L. Smith, L.J., said (p. 127): "The mere fact that the deceased knew that the work was manifestly dangerous of itself does not constitute contributory negligence. If it had been shewn that the deceased had used that which was dangerous in a negligent manner, that would have been contributory negligence, but this certainly was not proved;" and upon the whole case they concluded that the maxim did not apply.

Then, again, there is the case of Paterson v. Wallace, 1 Macq. H. L. (Sc.) 748. These reports I unfortunately have not got, as that case, I think, would be very instructive, but there is a fair quotation from it given in Beven on Negli-

gence, ed. of 1889, p. 315. That case was the one of the stone being on the roof of the mine, the master being aware of it and the servant as well. The citation of the case in Beven is as follows: "The cause of the action is that the husband of the pursuer lost his life by reason of their master through their agents having carelessly left a large stone on the roof of a mine in so dangerous a position that it fell on the workman while engaged in digging out coal and killed him. It was laid down that two propositions had to be established in order for the pursuer to succeed, and that those must be submitted to a jury for them to find affirmatively, first, that the stone was dangerous owing to the negligence of the master; second, that the workman whose life was forfeited lost it by reason of their negligence, not by reason of rashness on his own part. As to the first point, 'it is good law,' said the Lord Chancellor, 'that if the defendant's manager had failed in his duty untimeously directing the stone in question to be removed, it would afford no defence that the deceased continued to work after the orders for the removal of the stone had been ultimately given.'" This case would seem to be in conflict with the long-followed judgment in Priestly v. Fowler, 3 M. & W. 1.

In Hall v. Johnson, 3 H. & C. 589, the accident was of a similar nature to the one in Paterson v. Wallace. Both parties knew of the danger; the workmen repeatedly complained to the overseer of the mine or what they called the underlooker in the mine, but he was forced on to his work with threats, and in the evening the stone fell on him and he was killed. That case turned, however, on the liability of the master for the neglect of his under servant or overseer on the mine, and it was held that the servant could not recover for the negligence of his co-servant or co-labourer, and the master was not liable; but one would judge from the decision that if the master himself had been aware of the dangerous state of the mine he would have been liable.

The case of Smith v. Baker seems to have upset all the old law upon the matter, and if this case comes within it, I am bound by it. Armour, J., delivering the judgment of a Divisional Court in Murphy v. City of Ottawa, 13 O. R. 334, held that a deceased workman whose representatives were suing, having knowledge of the dangerous character of the work in which he was engaged, and just as much knowledge of its dangerous character as his master, had voluntarily en-

gaged in it, knowing it was dangerous, and therefore that the maxim applied in his case and that he could not recover. In this case Armour, J., took the same view as Lord Bramwell took in Smith v. Baker. Armour, J., also expressed the same view in Poll v. Hewitt, 23 O. R. 619, which was decided in 1892, and in that case Smith v. Baker was cited and relied upon, but the learned Judge distinguished the case from it, and still held to his old view that when the servant knew of the risk which he was running through a defect in the machine which he was operating, he entered upon the work volens and assumed the risk. The earlier case of Murphy v. City of Ottawa was decided long before Smith v. Baker; but the later case was decided afterwards.

However, I must follow Smith v. Baker if it applies. That was a case in which the person injured was a workman employed in work not in itself dangerous, in drilling in a quarry for a railway company, over which quarry the company by a different set of workmen were swinging a crane carrying rock out of the quarry, and a piece of the rock fell and injured the workman. This work had been going on for a considerable time, and the jury as a fact found that the machinery was defective, that the workman should have had warning; but it was also in evidence that the workman was fully aware of the possible risk which he was running, and continued to work knowing of the mode of working the crane. This case is somewhat different from the one before me, in that the workman was taking the risk of the operation of another class of workmen, and was not directly assuming the risk of his own acts, but assuming the risks of the acts of another; still the act was the act of his employer. Lord Watson, in giving his judgment, says: "Undertaking an employment with exposure to danger is one thing; undertaking the risk so that in case of injury there shall be no right of action is another;" and he says that "the fallacy which underlies the reasoning in Thomas v. Quartermain, 18 Q. B. D. 685, is in confusing those two things." Lord Bramwell, on the other hand, says (p. 344): "The maxim applies where, knowing the danger or risk, the man is volens to undertake the work. And I think the maxim does apply here. . . . The plaintiff here thought the pay worth the risk, and did not bargain for a compensation if hurt: in effect, he undertook the work, with its risks, for his wages and no more. He says so. Supposing he had said, 'If I

am to run this risk, you must give me six shillings a day and not five shillings,' and the master agreed, would he in reason have a claim if he got hurt? Clearly not. What difference is there if the master says, 'No, I will only give the five shillings?' None. I am ashamed to argue it." Lord Bramwell is so strong upon the point; but he is the only Judge out of the full Court who takes that line. The distinction which he draws is this, that the volens in taking the work, knowing the risk, is the volens of assuming the risk; that the bare going to work, knowing of an impending or possible danger, is an assumption of and an agreement to assume the risk. Lord Bramwell, having given that judgment, and the other Judges being aware of his views, the case is all the more important upon that point. Lord Halsbury in his judgment says: "For my own part, I think that a person who relies on the maxim must shew a consent to the particular thing done. Of course, I do not mean to deny that a consent to the particular thing may be inferred from the course of conduct, as well as proved by express consent. . . It appears to me that the proposition on which the defendants must rely must be a far wider one than is involved in the maxim 'volenti non fit injuria.' I think they must go to the extent of saying that wherever a person knows there is a risk of injury to himself, he debars himself from any right of complaint if an injury should happen to him in doing anything which involves that risk. . . . It is, of course, impossible to maintain a proposition so wide as is involved in the example I have just given; and in both Thomas v. Quartermain, 18 Q. B. D. 685, and in Yarmouth v. France, 19 Q. B. D. 647, it has been taken for granted that the mere knowledge of the risk does not necessarily involve consent to the risk. Bowen, L.J., carefully points out in the earlier case that the maxim is not 'Scienti non fit injuria,' but 'Volenti non fit injuria.' And Lindley, L.J., in quoting with approval the distinction made by Bowen, L.J., adds: 'The question in each case must be, not simply whether the plaintiff knew of the risk, but whether the circumstances are such as necessarily lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff.' And again, Lindley, L.J., says: 'If in any case it can be shewn as a fact that the workman agreed to incur a particular danger, or voluntarily exposed himself to it, and was thereby injured, he cannot hold his master liable. But in the cases men-

tioned in the Act, a workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it and complains of it, cannot, in my opinion, be held, as a matter of of law, to have impliedly agreed to incur that danger, or to have voluntarily incurred it, because he does not refuse to face it.' Again, Lindley, L.J., says: 'If nothing more is proved than that the workman saw danger, reported it, but, on being told to go on, went on as before in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk . . . upon himself.'" I have already cited Lord Bramwell's views. Lord Watson concurs with Lord Herschell practically in his judgment. Lord Herschell concurs with the majority of the Court, and follows their line of reasoning. He says (p. 362): "Where, then, a risk to the employed, which may or may not result in injury, has been created or enhanced by the negligence of the employer, does the mere continuing in service, with knowledge of the risk, preclude the employed, if he suffer from such negligence, from recovering in respect of the employer's breach of duty? I cannot assent to the proposition that the maxim 'Volenti non fit injuria' applies to such a case, and that the employer can invoke its aid to protect him from liability for his wrong." Lord Morris follows in the same vein. He says (p. 369): "There must be an assent to undertake the risk with the full appreciation of its extent."

The case of Williams v. Birmingham Battery and Metal Co., 68 L. J. N. S. Q. B. 918, was decided in 1899, after Smith v. Baker, and Smith v. Baker was therein referred to. A. L. Smith, L.J., followed that judgment and said: "It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care." Following the judgment of Lord Herschell in Smith v. Baker, Smith, L.J., then goes on to say: "This being the master's duty towards his man, if the master knowingly does not perform it, it follows that he is guilty of negligence towards the man. . . . That the mere knowledge of the risk does not necessarily involve consent to undertake the risk has now beyond question been settled by the House of Lords." And Romer, L.J., said: "Whether the servant has taken that (risk) upon himself is a question of fact to be decided on the circumstances of each case."

Now, to come down to the facts in this case, what have we got to prove that the plaintiff assumed the risk? Person-

ally, but for Smith v. Baker, I should be inclined to the opinion expressed by Lord Bramwell, that where a man knows of an impending danger and risk which he fears so much as to notify the employer of it, and after a consultation voluntarily goes on to work, he is volens as to the risk: but the House of Lords have decided the contrary. Lord Bramwell held that knowledge was volens; the Court directly opposed him on that point and said it was not. The Court must have meant something by drawing that clear distinction; they must have meant this and nothing but this, that there must be some evidence to satisfy the jury that the workman assumed the risk and took that risk upon his own shoulders. In this case it was the duty of the defendant Harding, when he saw the dangerous condition of the mine, to have taken the precaution of removing the source of danger. He did not do that. He took the risk of the slab falling. Now, did the workman voluntarily assume the risk, as the master did? I cannot find from the evidence that he did, and I take it, from the judgment of Smith v. Baker, especially as it is followed by the case of Williams v. Birmingham Battery and Metal Co., that there is an onus thrown upon the defendants to shift from themselves a prima facie liability which they are under of guarding their workmen, to prove that the workman assumed the risk so as to shift the liability from the shoulders of the master and place it upon the shoulders of the workman; that the simple continuing in work, especially under the facts in this case, is not, under the authority of Smith v. Baker, an acceptance of the risk. This view of the law was also followed in Brannigan v. Robinson, [1892] 1 Q. B. 344. In this case it was the clear duty of the defendants to have removed the source of danger at once. There is no doubt that if a workman goes to work at an occupation where the danger is one which may occur and does occur daily or hourly, and he knows of the nature of the risk he is running, and that that risk is part of his occupation, then he is volens and knowingly assumes all the risk himself, that being the character of the work in which he is engaged, and the ordinary task of his employment which he assumes when he enters upon the employment with that knowledge.

In addition to the cases which I have cited, I am referred to the case of Canadian Asbestos Co. v. Girard, 36 S. C. R. 13, and it is argued that if this case had been decided before

Elliott v. Mackinson, I should have given a different judgment in that case. I do not think so. In the case of Elliott v. Mackinson the defendants did nothing. It is true that they removed to a spot which they thought to be out of the danger zone, but the workmen were not quite sure that they were, as is evidenced by their crowding the car-tracks so as to get away as far as possible. In the Canadian Asbestos case there was no danger at all apprehended in any way. The owners took every precaution which reasonable men should take to ascertain whether the walls were intact after the blasting, sounding them with a crow-bar. It is true that they were mistaken, that in some way afterwards, without warning, a part of the wall became detached and killed the man; yet they had no indication at all of any danger which they thought they should guard against, which, I think, distinguished that case from Elliott v. Mackinson and in the same way it is distinguished from the case I am now considering.

There is also the case of Canada Foundry Co. v. Mitchell, 35 S. C. R. 452. This case cites all the cases which I have already considered and applies the principles therein contained.

I think this case comes clearly under the principle laid down in Lord Penzance's judgment, adopted in the House of Lords, in the case of Radley v. London and North Western R. W. Co., 1 App. Cas. 754, to this effect: "The plaintiff in an action for negligence cannot succeed if it is found by the jury that he himself has been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first, namely, that, though the plaintiff may be guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." I have already found that this was not a necessary peril of the work, but that the risk arose in the course of the employment, producing a new condition; and for this see the cases of Thrussell v. Handyside, 20 Q. B. D. 359; Paterson v. Wallace, ante; and Brydon v. Stewart, 2 Macq. H. L. (Sc.) 30. Thrussell v. Handyside allows a work-

man to say this: "I know I was running great risk; I didn't like it at all, but I could not afford to give up my good place from which I got my livelihood."

Upon the question of the acceptance or the non-acceptance of the risk, I might add further what was said by Lord Watson in Smith v. Baker: "When, as is naturally the case, the acceptance or non-aceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it unless he knew of its existence and appreciated or had the means of appreciating its danger, and, assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work after such knowledge and appreciation will in every case necessarily imply his acceptance. Whether it will have that effect or not depends, in my opinion, to a considerabe extent, upon the nature of the risk and the workman's connection with it, as well as upon other considerations, which must vary according to the circumstances of each case."

As I have already indicated, the main questions to be considered here are whether this danger was an ordinary incident of the work and one which the plaintiff assumed on entering the employment in the first instance, and whether he was volens in accepting the risk or not. On both points I am against the defendants. While it is true that occasionally just such things occur in mining as slabs falling from the roof, yet they are not of daily occurrence, and, if they were, the evidence is that they are dangerous and should be removed; that is, that the attention of the employer should be directed to removing the danger in the first instance before proceeding with the ordinary work and taking chances that the accident will not happen, and, next, under the authority of Smith v. Baker, I cannot find that this man voluntarily assumed the risk so as to relieve the employer of liability. It may be hard in this country that miners working as they do, in low-grade ground, and through drifts which become useless after the dirt is removed from them, should be compelled to take extraordinary precautions and lose time in work, but it is equally hard that the labourer should be exposed to unnecessary risk owing to the negligence of his employer, who, for the sake of saving a few hours' time and a very few dollars in money, will unnecessarily risk the safety or the life of his labourers. While I do not think that I can go so far as to say that the defendants in this case

were reckless or heedless, yet they were carelessly exposing their workmen to unnecessary risk. As I have said, they took the chance, and, having taken that chance, carelessly, I think, they are guilty of negligence under the definitions laid down. These definitions are various, but perhaps the one of Brett, M.R., in Heaven v. Pender, 11 Q. B. D. 507, comes nearest to meeting this case, namely: "Actionable negligence is the neglect of the use of ordinary care and skill towards a person to whom the defendant owes a duty of observing ordinary care and skill by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property."

On the whole case I think the plaintiff has established his action, and is entitled to damages. These damages I will fix at the sum of $1,377, made up as follows:

Doctor	$ 200
Hospital	291
Lost time, 180 days at $4 a day	720
Board for 83 days at $2 per day	166
	$1,377

I do not allow the board for the full time, as, so far as appears from the evidence, the plaintiff's treatment at the hospital which is allowed for included board for 97 days.

YUKON TERRITORY.

CRAIG, J. NOVEMBER 1ST, 1909.

TRIAL.

VACHON v. LEFEBVRE.

Promissory Note — Payment — Retirement — Subsequent Reissue under New Arrangement, to Secure Existing Debt—Right of Holder to Recover Amount Due—Action on Note—Amendment.

The plaintiffs sued on a promissory note for $414 and interest, the note bearing date 1st November, 1905, and falling due on 1st May, 1906, with interest before and after maturity at the rate of 18 per cent. per annum. The plain-

tiffs at the trial admitted that an error was made in suing for the full amount of the note, and that there should be a credit allowed of $170, the balance on the note being $270.

The defendant alleged that the note had been paid in full and had been retired and handed over.

J. P. Smith, for plaintiffs.

Frank J. McDougal, for defendant.

CRAIG, J.:—The circumstances of the case, as I find them, are as follows. The plaintiff Vachon, being on a collecting tour on the creeks where the defendant lived, saw the defendant's wife, drove with her to where the defendant was working, had an interview, and mentioned the fact that he was collecting both the note and an open account for produce sold. The defendant said his wife would go back with the plaintiff and settle the matter as far as she could. On returning Vachon saw the wife of the defendant and she paid him the note. Vachon says a reduction was made in the account on the condition that the balance of the open account should be settled within 30 days. The note was handed over to the woman, and half an hour after Vachon returned and asked to re-arrange or to change the appropriations. He says that with her consent the note was handed back, and he indorsed upon it the following: "June 20th, 1906. Received on account of note $170; allowance made on interest $24.17; balance due $270." And the note was certainly handed back to him. The wife of the defendant, who seems to be a clear-headed woman of intelligence, says that it is true that Vachon came back in half an hour and asked for the note, and she handed it back to him; that she saw him making certain indorsements on the note; that when the note was originally paid by her, before Vachon left the house, she asked for a receipt, and he said there was no need for a receipt, that the note being in her possession was a sufficient receipt and evidence to her of its payment. Vachon says, on the contrary, that he gave her a receipt for the amount paid, which stated the balance. I am quite certain from the evidence of Vachon and from the demeanour of the woman that what Vachon says is perfectly true, that there was an open account for produce sold—sold, it is true, before the making of the note but not included in it, Vachon's reason for this being a reasonable one, that the produce was sold for actual cash to him in Dawson and was to be paid at once,

but the note was an accommodation, an indulgence and extension of an old account. One Dubois was present at the time of this arrangement and handling of the note. His recollection is not very clear, but he says there was some conversation; what it was he could not remember, but he says that he saw Vachon, with the consent of the wife of the defendant, making certain indorsements on the back of the note, but he did not know what they were. Again, Lefebvre met Vachon on the creeks some time after this, when a demand was made for payment, and, Vachon says, Lefebvre acknowledged the debt—a balance of $270. Lefebvre met Vachon in the office of his solicitor to arrange a settlement, but no such contention was then raised as is raised now. I believe fully the story of Vachon, supported by his own clear testimony and not strongly contradicted but confirmed in this, that the witness Mrs. Lefebvre purposely does not remember what took place.

The difficulty now is that the plaintiff has sued upon a promissory note which was at one time retired. I can find very little help in the authorities in dealing with a case of this kind, apart from my extensive powers of amendment under sec. 117 of our Ordinance, which provides that "the Court or Judge may at any stage of the proceedings allow either party to alter or amend his statement of claim or pleadings in such manner and upon such terms as are just, and all such amendments shall be made as are necessary for the purpose of determining the real questions in controversy between the parties." If Vachon had never returned, it is quite certain that this note was retired. What is the result of the handing back to him of the note under the arrangement which I find to have been made? Is it a re-issue of the note and is the promissory note still a good promissory note in the hands of the holder? I do not think I need to determine that question. But it seems to me that if a certain appropriation had been made, and the whole thing had been practically instantaneous, and the arrangement which was made half an hour afterwards had been made at the time, there is nothing in the law to prevent the retention of the note by Vachon as evidence of a continuing debt secured by it. He said he was leaving the country at the time, and his object in holding the note was that the open or unsettled account should be paid up, and

he should have the note as evidence of the balance unpaid upon it—a very reasonable arrangement. However that may be, another question arises as to the right of the wife of the defendant, acting for her husband, to re-issue the note for him, and, after it had once been retired, to hand it back under the arrangement made. I think, however, that there was such a settlement as is asserted by the plaintiff, that a balance remained unpaid of $270, that that balance was ascertained and fixed, and I will allow any amendment necessary to set up a claim for that balance, the evidence of the presence of the note and the indorsement of it being evidence of its existence.

There will, therefore, be judgment for the plaintiff for $270, with interest at 5 per cent. from 20th June, 1906, with the costs of action.

EXCHEQUER COURT OF CANADA.

(YUKON ADMIRALTY DISTRICT.)

CRAIG, LOC.J. NOVEMBER 5TH, 1909.

TRIAL.

WALTENBAUGH v. THE "PAULINE."

Master and Servant—Wages—Contract of Hiring—Dispute as to Terms—Engineer of Ship—Evidence.

Action for wages.

John Black, for plaintiff.
C. W. C. Tabor, for defendant.

CRAIG, J.:—The plaintiff sues for wages, and has arrested the ship, he being chief engineer for the season of 1908. No written contract was signed between the plaintiff and the owners of the ship, Raymond & Son.

The contention of the plaintiff is that he was engaged for the season, not to exceed 7 months, and was to be paid for that season wages of $1,650. The contention of the defendant, on the other hand, is that he was to be paid, at that rate, so much per month for the time he worked; that he was also to lose any time during which the ship was not

earning or laid off owing to accident; that he was to serve both watches as engineer, and thus save the services of a second engineer.

The engagement, whatever it was, took place some time in March, and the plaintiff was notified to be ready for service on 1st April. This is not contradicted. He actually went to work on 12th April, he and the owner going down to where the ship was on the ways and putting her in shape ready for commission. Both parties agree that a written contract of some kind was tendered on 11th April, before the departure for the ship. Waltenbaugh says that there was submitted to him a pencilled outline of the contract, which he approved of, and that Raymond promised to have it written out to be signed the following morning; that he was notified that the contract was ready, lying on the table of the Raymond house, at which he called for his luggage on his way to the sleigh, but that no contract was there. Raymond, on the other hand, says that on the evening of this conversation there was a completed contract ready for signature, and that Waltenbaugh asked to be excused from signing it because he had on his mittens and was on the way home. However that may be, Waltenbaugh says he called the following morning, but no contract was there. Both went to the ship, but the elder Raymond, who had the contract, did not get to the ship for a week after Waltenbaugh, and when he got there he had no contract, saying he had forgotten it, and not until some time after did he tender to Waltenbaugh a written contract—exhibit D at the trial—which Waltenbaugh alleges to be entirely different from the one he was to have signed. This contract Waltenbaugh refused to sign. Raymond says that he took out of the contract the part relating to both shifts, and that the balance of the contract was agreeable to Waltenbaugh. This Waltenbaugh denies, and he was allowed to continue working with this dispute pending. So that we have a direct contradiction between Waltenbaugh and Raymond & Son as to the actual contract. Waltenbaugh's contention is confirmed by the only really independent witness, namely, one Greer, who was master of the ship, and who says that he had conversations with both the father and son, the owners, who spoke of a season's hiring and not of a monthly hiring, and that no other hiring was ever mentioned, and that on one occasion, when the son spoke of his father having laid off Walten-

baugh during a break-down, he questioned their right to lay off a man who was engaged for the season, and that the young man could give no explanation of why he should be laid off. As further evidence that the engagement was for the season, there is the fact that Waltenbaugh was, with the permission of the Raymonds, engaged by one Blankman to do certain work on a dredging plant on the Indian River, while their ship was waiting at Dawson for freight, and that money for the services of Waltenbaugh was paid to the owners of the ship, shewing that, even during the time when the Raymonds should have lost his wages owing to the ship not earning, he was used by them and his services collected for.

About 18th or 20th June the crank-shaft broke. Waltenbaugh says he was asked to go to White Horse with Raymond to attend to the repairs; that he went with him, that the White Pass Company, the only people having shafts suitable for the work, refused to allow any repairs to be made in their sheds or to sell any material; and that Raymond had to proceed to Juneau for the repairs, and that he waited in White Horse for his return. Raymond says that Waltenbaugh left without leave and that he laid him off. There is some confusion in Raymond's evidence here as to whether he was relying upon his right to lay him off or upon Waltenbaugh's leaving without leave. One Alley is called as a witness, who swears that Waltenbaugh told him he had quitted the employ of Raymond, and that he heard Waltenbaugh negotiating for other employment with one Ogilvie, the manager of a dredging company. Alley is not an independent witness, because it is sworn by Waltenbaugh, and not contradicted, and it appears quite clearly from the course of the transaction, that he was antagonistic to Waltenbaugh, having handed over to the Raymonds certain documents which could only have come from his possession, and which he received in a confidential character as agent for Waltenbaugh, at a time when he was acting agent for him. This Alley has done in breach of his trust to Waltenbaugh, and therefore he must be in a somewhat antagonistic attitude towards Waltenbaugh in this matter, and Waltenbaugh swears that they have quarrelled. It is also certain from the correspondence that Waltenbaugh was not acting fairly with his employers, because he was corresponding with Alley, his agent in that year, informing him of certain

offers made to the owners of the "Pauline" by people with with whom he (Waltenbaugh), through Alley, was negotiating for the same purposes, namely, the contracting for certain work for a dredging company, Waltenbaugh being part owner of a ship called the "Quick," this ship being an applicant for the work as well as the "Pauline."

The owners and the master of the ship are clearly to blame for not having a written contract with the engineer. It is singular that Waltenbaugh should avail himself of such a flimsy excuse for not signing the contract—because he had his mittens on. It is also singular that Raymond should come down to the ship a week after and not bring the very contract which he says was settled and agreed on, and not till long after produce any contract. It is also singular, if Alley's evidence is right—that Waltenbaugh had left the employment of the Raymonds—that Waltenbaugh should have met Raymond at the train on his return from Juneau and taken out of his hand without a word of explanation certain parts of machinery, which he at once proceeded to put in shape for the ship. If Alley's evidence is correct, then Waltenbaugh was discharged, and, before he could go to work again on the ship, a new contract or agreement should have been made. There is not a tittle of evidence of that kind given by Raymond, of any new hiring. The only question upon which I am in doubt is as to whether Waltenbaugh left on his own business or whether he was asked to go by Raymond. I am inclined to think that on this point the weight of evidence is against Waltenbaugh. He was certainly carrying on negotiations of some kind with Ogilvie, the manager of the dredge company, who were opposed to his remaining in the employ of the "Pauline," and, therefore, I think I must hold that for the 25 days when he was absent he was absent on his own business, and should not draw wages. His claim will, therefore, be reduced by the sum of $196.42, leaving a balance coming to him for wages of $200.58, for which there will be judgment, with the costs of the action.

ALBERTA.

BECK, J. NOVEMBER 5TH, 1909.

CHAMBERS.

TUCKETT CIGAR CO. v. WICKETT.

Summary Judgment—Rule 326—Scope of—Judgment before Appearance—Grounds for—Practice.

Pursuant to leave granted ex parte by HARVEY, J., under Rule 326, the plaintiffs served notice upon the defendant of a motion for summary judgment. The notice was served with the writ of summons and statement of claim, and was returnable within two or three days of its service.

The motion came before BECK, J., in Chambers.

J. T. C. Collisson, for plaintiffs.

No one appeared for defendant.

BECK, J.:—It appeared that the grounds upon which the plaintiffs claimed to be entitled to judgment in this speedy and summary way, before the lapse of the time limited for appearance, were that the defendant had admitted the claim; that all his effects were advertised for sale by auction to take place within a few days under a chattel mortgage, the renewal of which was invalid inasmuch as the renewal statement filed was not sworn, there being no signature to the jurat.

I refuse the order, and the plaintiffs must get judgment according to the ordinary practice. I do not think that it would be "conducive to the ends of justice" to give effect to the Rule in the present case. The mortgage itself appears to be valid. It bears date nearly a year prior to the incurring of the plaintiffs' demand. The plaintiffs are wholesale merchants, and in the ordinary course of things, no doubt, had learned of the mortgage before giving the defendant credit. The defect in the renewal statement was, no doubt, an accidental error, for which the mortgagees' solicitor would be liable to the mortgagees, if it resulted in loss to them. I think that the Rule—which provides an

extraordinary method—is intended to be given effect to only where a plaintiff, if he is compelled to follow the ordinary course of procedure—in which I include the procedure for leave to sign final judgment notwithstanding appearance (Rule 103) or on admissions (Rule 229)—will probably lose the amount of his claim through some fraudulent, negligent, or other improper act or omission of the defendant himself. To apply it to a case where, as here, a third party is apparently exercising bona fide a just and legal right against the defendant's effects, would be in effect to adjudicate upon his rights in his absence. I may add that Mr. Justice Stuart agrees with the conclusion at which I have arrived.

ALBERTA.

BECK, J. NOVEMBER 8TH, 1909.

CHAMBERS.

GOWAN v. KOLCHEU.

Security for Costs—Interpleader Issue—Defendants in Issue out of Jurisdiction.

Application by the plaintiff, on an issue directed on a sheriff's interpleader, to compel the defendants in the issue (execution creditors) to give security for costs.

H. H. Parlee, for the plaintiff.

J. E. Wallbridge, for the defendants.

BECK, J.:—I adopt the decision of the Court of Appeal in Ontario in Knickerbocker Trust Co. v. Webster, 17 P. R. 189, and make the order.

ALBERTA.

BECK, J. NOVEMBER 8TH, 1909.

CHAMBERS.

LITTLE v. WHITELEY.

Costs—Scale of—Taxation—Set-off—Tariff—Item 95.

The plaintiff recovered judgment in the Supreme Court for $372, the trial Judge's memorandum as to costs being:

"District Court costs. Rules to be followed." The clerk on the taxation held that item 95 of the tariff of costs must, since the passing of the Supreme Court and District Courts Acts—the District Court having jurisdiction up to $400—be read as if $400 was substituted for $200, and that therefore the defendant was entitled to set off his costs on the Supreme Court scale. The plaintiff appealed.

C. H. Grant (Rutherford & Jamieson), for plaintiff.

W. J. A. Mustard (Boyle & Parlee), for defendant.

BECK, J.:—After consultation with Mr. Justice Stuart, I have come to the conclusion that item 95 is not to be taken to be altered, and that therefore there is no right of set-off.

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MANITOBA.

MATHERS, J. DECEMBER 2ND. 1909.

SINGLE COURT.

HOWARD v. LAWSON.

Judgment—Default of Defence—Service of Statement of Claim by Publication—Action for Declaration of Trusteeship of Lands and to Transfer Title to Plaintiff—Refusal to Grant Judgment.

This was an action to have it declared that the defendant was a bare trustee for the plaintiff of certain lands in Manitoba, and for an order, inter alia, vesting the title of the said lands in the plaintiff.

A motion was made by the plaintiff for final judgment on the statement of claim, no defence having been filed, and interlocutory judgment having been entered.

W. P. Fillmore, for the plaintiff.

No one appeared for the defendant.

MATHERS, J.:—The statement of claim alleges that the plaintiff on 14th February, 1902, entered into an agreement to purchase the lands in question from the Manitoba and North-West Loan Company, which company purported to sell under a power of sale contained in a mortgage thereof from one J. S. Aikins; that on 1st June, 1904, the company, by indenture of assignment, granted and assigned the said mortgage to A. L. Aikins, wife of the mortgagor; that on 2nd October, 1907, the plaintiff, by indenture of assignment,

assigned and set over to the defendant the articles of agreement, dated 14th February, 1902, and all his right, title, estate, and interest in the lands therein comprised; that such assignment, while absolute in form, was given as a matter of convenience only and for the purpose of facilitating any sale of or dealing with the lands by the plaintiff, and not otherwise, and the defendant was to hold and now holds and possesses the lands as a bare trustee and not otherwise; that the last mentioned assignment purported to be in consideration of $1,500, but said sum was not paid to the plaintiff by the defendant nor to any other party or parties on his behalf, nor was there any consideration whatever for the said assignment; that on 1st October, 1907, the said A. L. Aikins did grant and convey the said lands to the defendant under the power of sale contained in the said mortgage, and that the defendant did mortgage to A. L. Aikins the said lands in the amount of $585.

The statement of claim further alleges the registration in the proper land titles offices of these various instruments. It also alleges that on 12th November, 1907, a certificate of title to the said lands under the Real Property Act was issued to the defendant, pursuant to an application, and that the land now stands in his name subject to the last mentioned mortgage.

The statement of claim was not personally served on the defendant, but service thereof was made by publishing an order made by the Referee on 14th January, 1909, directing the defendant to file his statement of defence on or before 13th February, 1909, and, underneath, a notice that unless he did so the plaintiff might sign judgment on his own shewing, and that the defendant would not receive any further notice of the further proceedings in the cause.

No defence having been filed, on 29th October, 1909, on proof of publication of the Referee's order in a Winnipeg daily newspaper on the 16th, 18th, and 20th days of January, 1909, the learned Referee made an order that judgment be recovered by the plaintiff against the defendant as in his statement of claim demanded.

Pursuant to that order interlocutory judgment was signed against the defendant on 29th October.

On the face of the proceedings the plaintiff appears to be entitled to the relief asked, and I do not conceive it to be ordinarily the duty of the Court to go behind

the interlocutory judgment and examine the proceedings upon which it is based, but in a case like the present, where the Court is asked to take away from the defendant the title to property that stands in his name, and vest that title in the plaintiff, the Court cannot exercise too much care. In this case there is nothing except the bald allegation unsupported by any evidence, or corroborating circumstances, that a conveyance made by the plaintiff to the defendant, though absolute in form and for an expressed valuable consideration, was not what it purported to be, but was a conveyance to the defendant as a bare trustee for him.

The material on which the order for service by publication in this case was made consists of two affidavits, one by Mr. Fillmore, one of the solicitors for the plaintiff, the last paragraph of which says he was recently informed by Mr. Smith, of the Bolton-Smith Land Company, in whose office the defendant at one time had a desk, that the defendant left Winnipeg in the winter of 1907, and at the time he was talking of going to the State of Washington, U.S.A. The other affidavit is by Mr. Webb, the agent of the plaintiff. He deposes that the defendant came to Winnipeg from Thief River Falls, Minnedosa, U.S.A., and that he wrote to the defendant at that place and to the sheriff of that district, but received no reply. On that material it would appear that there are three places where the defendant might be known, and in which the publication of an advertisement might come to his knowledge, but of these a publication in Winnipeg was least likely to be effective, because both affiants swear to a belief that he had left the city of Winnipeg. Publication of the Referee's order at Thief River Falls, where the defendant came from, or in the State of Washington, U.S.A., where he is supposed to have gone, would be more likely to bring it to his knowledge.

Rule 183 as to ordering substitutional service is extremely wide, but, when service by publication is asked, it should not, as a rule, be granted unless there is some reason for believing that the advertisement will come to the knowledge of the defendant. That is one of the rules laid down by the Masters of the King's Bench Division in England for their guidance in ordering substitutional service: Annual Practice, 1910, pp. 64-66.

In this case I see no reason for believing that this action has ever come to the defendant's notice, and I am by no

means satisfied that the plaintiff has exhausted all efforts to locate the defendant and communicate to him personally the proceedings he proposes to take. In the exercise of the caution that I think the Court ought to observe when it is asked to take the property which apparently belongs to one man and vest it in another, I refuse the plaintiff's motion for final judgment.

MANITOBA.

METCALFE, J. DECEMBER 8TH, 1909.

TRIAL.

VON FERBER v. ENRIGHT.

Landlord and Tenant—Lease—Dispute as to Provisions—Expiry of Terms — Notice to Quit — Overholding Tenant.

Action to recover possession of land leased to the defendant and to vacate a caveat registered by the defendant under the Real Property Act.

G. A. Elliott and G. M Macneil, for the plaintiff.

T. H. Johnson and H. A. Bergman, for the defendant.

METCALFE, J.:—In April, 1904, Antoine Bernhart and Joseph Bernhart, under a certificate of title, became the registered owners of certain land situate in the city of Winnipeg. In 1906 the defendant, under a lease in writing, became tenant of said premises for a period expiring on 1st April, 1908. The defendant thereupon entered upon the premises and occupied the same as a butcher's shop, and has continued to so occupy the same. This lease contained a provision that, under certain conditions, the defendant must vacate the said premises on 3 months' notice. In the latter part of 1907 the defendant was anxious to secure a further lease of the premises, and, after some negotiations, Joseph Bernhart instructed one Hollings, then in the employ of the Bernharts, to prepare a lease. He says he handed the old lease to Hollings and told him to copy the terms. Hollings says he did so, and that his intention was to make a lease similar to the old one, the only object being to extend the

time. He drew the lease, bearing date 18th December, 1907, for a term of 5 years. In some way this got into the possession of defendant Enright, who called upon Antoine Bernhart to have the same executed. Antoine Bernhart says that his brother was ill, and he refused to sign it. Afterwards Enright met Joseph Bernhart for the purpose of having the lease executed. Enright says he desired to be relieved from the 3 months' clause. Joseph Bernhart as stoutly maintains that he desired to retain it. The lease as prepared by Hollings did not contain any such provision for termination. After some discussion, the document prepared by Hollings was somewhat altered, red ink lines being drawn through certain portions of the lease, and the following words were written in by Joseph Bernhart: "This lease is not to affect the present lease to April first next by the lessee to the lessor." Thereupon the lease was executed under seal, the defendant signing, and Joseph Bernhart executing the same by signing "J. & A. Bernhart." Antoine Bernhart did not sign, neither does it appear that he expressly authorised the execution. He did not know that his brother Joseph had signed the lease until some time after its execution. Enright continued in possession and paid rent, to the knowledge of Antoine Bernhart.

The defendant says that, relying on the strength of a 5-year term, he made valuable improvements, worth roughly $1,200 or $1,300. While admitting that the defendant made certain improvements, Joseph Bernhart says that they are of little or no value. While such improvements are perhaps valuable, no satisfactory evidence is given as to their real value, nor does it appear that such are not trade fixtures which might be removed by the tenant.

In February, 1909, the Bernharts sold the land to the plaintiff. Upon searching the title, it was found that the defendant had registered a caveat. Joseph Bernhart thereupon gave the plaintiff two documents of guarantee or indemnity against the lease, in one of which he states that Enright's lease is subject to the following term: "That in case I, J. Bernhart, desire to re-build on the said property the said J. Enright must vacate said butcher's shop with not more than 3 months' notice."

Thereupon an agreement in writing was entered into between the said Bernharts and the plaintiff, by which the Bernharts agreed to transfer to the plaintiff the lands and

all the leases, and a transfer was delivered to the plaintiff, who registered the same, subject to the defendant's caveat. In due course a certificate was issued to the plaintiff, subject to the said caveat. The plaintiff thereupon informed the defendant that he wished to build on the premises, and, the defendant refusing to vacate, the plaintiff caused notice to be served, and afterwards brought this action.

During the trial both parties at various times asked for various amendments, and I said I would allow such amendments as might be necessary to do justice according to the evidence.

It appears that both copies of the original lease are either lost or destroyed. It is not denied, however, that the original lease contained the provision already mentioned in the guarantee given by Joseph Bernhart to plaintiff.

The defendant contends that the provision above referred to, inserted in the new lease by Bernhart, continues the provisions of the old lease in force "except in so far as the same are varied by the new lease." It seems to be admitted that, except as to the notice clause and other alterations explained, the present lease is similar in terms to the prior lease, excepting as to time.

The plaintiff claims:—

1. That the clause written in the last lease by Bernhart continues the provisions of the first lease as to notice, and that, notice having been given, the defendant must vacate.—or

2. In the alternative: (a) that the last lease is not binding on Antoine Bernhart; (b) that the defendant is an overholding tenant; (c) that the 3 months' provision still continues.

To this the defendant answers:—

1. That he is in possession under the later lease, and that there is no provision as to termination.

2. That in any event the right to enforce the condition did not pass to the plaintiff.

3. That the notice is insufficient.

I think that the provision inserted in the second lease by Bernhart does not continue in any way the provision of the old lease beyond 1st April, 1908.

The notice relied on was given during the month of March, 1909, and is a notice to quit on 1st July, 1909. If the defendant is in possession under the first lease, and if

the provision as to notice does not continue, the plaintiff cannot succeed. Neither can the plaintiff succeed if the defendant is in possession as an overholding tenant. The only effect of the provision is to shorten the ordinary half year's notice which is required under such circumstances, from 6 months to 3 months, and that any notice to be effectual must expire at the end of the first or some other year of the tenancy and not at any other part of the year: Doe v. Donovan, 1 Taunt. 555; Dixon v. Bradford, [1904] 1 K. B. 444.

The conclusion that I have arrived at renders it unnecessary to consider the other points raised by the plaintiff.

There will be judgment for the defendant with costs.

BRITISH COLUMBIA.

LAMPMAN, CO. C.J. DECEMBER 1ST, 1909.

COUNTY COURT OF VICTORIA.

CUTHBERT v. CAMPBELL.

Principal and Agent—Agent's Commission on Sale of Hotel Property — Purchaser Found by Agent—Principal Declining to Complete Sale—Right to Commission.

Action by a real estate agent for commission. The employment of the agent was admitted, and the main question of fact for decision was whether the defendant agreed to sell to one Taylor the Colwood Hotel premises, including everything with the exception of a horse, colt, two buggies, and set of harness (hereafter referred to as the horse and buggy), or whether the defendant included in the exceptions "a few personal things and some things I don't own."

R. T. Elliott, K.C., for the plaintiff.

Aikman, for the defendant.

LAMPMAN, CO. C.J.:—The plaintiff and the intending purchaser, Taylor, went through and looked over the hotel premises, and then met the defendant in the plaintiff's office. Cuthbert, Campbell, and W. J. Robertson, who was then

associated in business with Cuthbert, had a preliminary talk before Taylor came in, and in this conversation Robertson says that Cuthbert asked Campbell if the price of $13,000 included everything, to which Campbell said, "yes." Cuthbert says when Taylor came in he told him that Campbell agreed that everything goes just as it is, and Campbell said, "Hold on a bit, there are a horse and buggy which I am going to keep," and they then discussed terms, &c., and went over to Mr. Moresby's office to have the necessary documents drawn, and gave him instructions to draw them. The next day he says they returned in connection with the papers, and he then asked Campbell who owned the slot machine, and he said he did, and that it went with the house and was worth $600. After the papers were drawn by Mr. Moresby, Taylor submitted them to Mr. Higgins, who expressed his approval, and Taylor got a $5,000 (the agreed cash payment) cheque marked at his bank, and he, Cuthbert, and Campbell met at Mr. Moresby's office on the afternoon of Friday 30th July, and they then arranged to go out in company with Mr. Lowe and make an inventory and take over the property, and Mr. Lowe was to receive the cheque, and his firm was to pay some debts against the business and complete the transaction so far as the papers were concerned.

When they arrived at the hotel at Colwood and commenced the inventory, Campbell said the slot machine was not included in the sale, as he only owned half of it; he also wanted to exclude a graphophone, which, he said, belonged to his daughter, a sewing machine and a bedroom suite as belonging to his wife, and also some guns. Taylor was dissatisfied with the exceptions, and, as it was night, they agreed to meet next morning at Mr. Moresby's office.

They met and Cuthbert says that Taylor told Campbell, "You have stopped out of the original deal stuff that I value at $1,000, and, if you put them in, O.K., but, if you don't, I think you should deduct $1,000." They could not come to an arrangement then.

At p. 7 of Campbell's examination for discovery it would appear that he was firm in his resolve to except the slot machine, graphophone, &c., from the sale: "A. Well, he says, if that is the case the deal cannot go through; we will want $1,000 taken off for that; that is what Taylor said. He said, 'I would like to have $1,000 taken off if you are going to keep all those things out.' 'Reduce the price,' he says then,

'and you can keep these things.' I says, 'No, I will do nothing of the sort.' I says, 'I want those things or nothing at all, and the price to stand as it is.'"

Cuthbert went on and endeavoured to have a modified arrangement put through, as Campbell afterwards agreed to include the slot machine, &c., but Taylor had left the city, and would have nothing more to do with it.

Campbell contends that he excepted some things in addition to the horse and buggy, but in his examination for discovery he, in effect, admits it was several days after they had started to make the deal before there was any talk about exceptions other than the horse and buggy. Now, the first day Campbell, Cuthbert, and Taylor met, they went at once to Mr. Moresby's office, and it is admitted that Mr. Moresby took instructions to draw the necessary papers. This was probably on Thursday; on Friday the question arose on the taking of the inventory; and on Saturday they met in Mr. Moresby's office. Cuthbert swears that he or Taylor said that Campbell claimed he was entitled to keep out the horse and buggy, and Mr. Moresby said he would soon straighten that out, and he thereupon got his memorandum made the day before and read it out, saying "everything to go with the exception of the horse, colt, 2 buggies, and harness."

Mr. Moresby was called as a witness by the defence, and neither he nor the plaintiff was asked a question about this by counsel for the defence. Needless to say Mr. Elliott left the matter severely alone in his cross-examination, as the evidence already given by Cuthbert was sufficient for his purposes and had not been contradicted.

For the defence it was not admitted that Mr. Lowe was to receive the $5,000 cheque, but Mr. Lowe was in Court during part of the trial, and was consulted by counsel for the defence, and I have no doubt that, if he had been prepared to contradict Cuthbert on this point, he would have been called.

I think it is quite clear that Campbell never referred to any exceptions other than the horse and buggy until the evening of the meeting at Colwood. Mr. Aikman lays great stress on a mistake which Cuthbert apparently made about the rate of interest on the deferred payment, and on the fact that Campbell would not be likely to agree to sell the things which did not belong to him. As to Cuthbert's mistake, it was on an immaterial point, and as to Campbell's act, I do

not think it was at all unusual, as he had control over the things, and the next week did agree to include them all in the sale.

On the facts I have no doubt that Cuthbert is entitled to succeed. It is contended that, as the sale did not actually go through, he cannot succeed, but, as the contention of counsel for the plaintiff is based on a state of facts so much at variance with the true facts, it is useless for me to deal with it. Cuthbert found a purchaser who had a certified $5,000 cheque in his pocket, which he was going to pay over when the property was handed over to him, but when he went to get possession the defendant refused to give it to him, and the next morning continued to refuse.

If the agent did not earn his commission here, it is difficult to imagine a case in which he does earn one. There was nothing more for him to do, as the conveyancing was being done by a solicitor. Even the exact amount of his commission had been agreed on at $550, and for that amount he is entitled to judgment.

SASKATCHEWAN.

McLORG, DIST. CT.J. NOVEMBER 18TH. 1909.

DISTRICT COURT OF SASKATOON.

RE TOWN OF VONDA AND MANTYKA.

Municipal Corporations — Expropriation — Right to Take Land for Purpose of Sinking Well — Compensation — Notice to Claimant—Form of—By-law—Failure to Deposit Plans — Condition Precedent — Town of Vonda Act, 1908, sec. 236.

Application by the town corporation, under the provisions of sub-sec. 3 of sec. 236 of the Town of Vonda Act, ch. 17 of the statutes of 1908, to bar the application of one Stefan Mantyka for compensation for lot 19, block 11, Vonda.

R. W. Shannon, for the town corporation.

F. F. MacDermid, for Stefan Mantyka.

McLORG, DIST. CT.J.:—The application was resisted by Mantyka on various grounds which I will deal with. The first objection was that the town had no right to take land at all for the purposes of sinking a well—the case here.

Sub-section 22 of sec. 169 gives the town power for "regulating and controlling the use of wells" and "making provision for a supply of water for the town." This, I think, inferentially gives the town power to expropriate land for the purpose of sinking a well or wells.

There are a number of provisions in this section which would be rendered valueless if so restricted a construction is put on the Act—for instance, 17, 18, 65, 73, and so forth. In none of these is special provision made for expropriating the land on which the various buildings contemplated in these sections are to be erected.

Further objection is made to the form of notice given to the claimant. I think the notice amply sufficient; it complies with the requirements of the Act. Another objection is that the affidavits of Totzke and Graham are sworn before Mr. McGregor, who is alleged to be a member of the town council of the corporation of the town of Vonda.

In the first place, there is no such positive statement as would be necessary before one would refuse these affidavits. Mr. MacDermid merely asserts that he is informed to that effect; and secondly, assuming it to be true, I can see no valid objection on this ground.

The last objection is that before taking the land the council did not comply with the requirements of sec. 236, which reads as follows: "Before taking any land the council or commissioners shall deposit with the secretary-treasurer plans and specifications shewing the land to be taken or used and the work to be done thereon and the names of the owners or occupiers thereof according to the last revised assessment roll."

It was contended on behalf of the town that this is not a condition precedent, but simply for the purpose of protecting the town from actions for trespass.

I am not prepared to say that "taking any land" means merely entering into possession of it, as was done in this case—nor would I hold that, because the town were trespassers in the first instance, that would preclude them from launching at a subsequent date their expropriation proceedings. But the trouble in this case is that they not only

entered on to the lane and took possession of it, but they passed a by-law expropriating it before they filed their plans and specifications.

The date of entry on to the land is 9th June; the date of the by-law is the 22nd; the deposit of plans, &c., is the 23rd; and the notice to the claimant the 24th. In fact they made the land theirs, in so far as it was possible to do so, before they filed their plans at all. Now, surely the whole object of having plans and specifications filed is to afford an opportunity to the parties affected to examine these prior to the expropriation proceedings.

In Parkdale v. West, 12 App. Cas. 602, an action bringing into question the Railway Act, where one of the provisions was that the plans or book of reference relating to the alterations should be filed, and this had not been done, the Court held that the railway companies had not taken the first step required to entitle them to commence operations. The provision in that instance seems very similar to the one prescribed in this case. The language of the statute here is very plain. It says, "Before taking any land the council shall deposit."

It is true that in the case I have cited no plan or book appears to have been ever filed, but in principle I can see no difference between that and filing a plan, as in this case, after the expropriation proceedings are over.

I am of opinion that the words "before taking" the land, &c., constitute a condition precedent to the right of the town to expropriate, and that consequently non-compliance with them is a fatal defect and an objection which Mantyka can effectually take.

The application must, therefore, be dismissed. I may say I regret having to come to this conclusion, because I am satisfied that the claimant has been in no way prejudiced by the omission, in the circumstances of this case, that of the acquisition of a specific lot; he could not be; and, further, I am of opinion, from the evidence before me, that he has been offered a fair price for his property—in fact I see little merit in his opposition, bearing in mind the fact that the proceedings herein are for the benefit of the public; but I think to hold that the filing, at the time it was done, is a substantial compliance with the Act, is quite impossible, and might lead to a very loose way of carrying on business by the council of various towns, and that the safeguarding of in-

dividual property would be jeopardised if such a construction were put on it.

Having held that the claimant had the right to take this objection, I see no reason why he should not be entitled to his costs, which I direct to be taxed on the lower scale and to be paid by the town.

SASKATCHEWAN.

NOVEMBER 20TH, 1909.

FULL COURT.

WOOD v. BARKER.

Master and Servant—Wages—Action for, by Assignees of Servant—Defence—Grossly Immoral Conduct of Servant Disentitling him to Wages.

In this action the plaintiffs sued as assignees of one Holloway, who was employed as a farm servant by the defendant for the season of 1908, at $25 per month and 50 cents per day extra for the time he was threshing. The defence was the grossly immoral conduct of the servant, by the seduction of the defendant's infant daughter during the term of service, which came to the defendant's knowledge only on 23rd October, 1908, when the servant was leaving the defendant's employment at the completion of his term of service. The District Court Judge before whom the action was tried held that the servant had forfeited all right to his wages by such conduct, and gave judgment for the defendant. From this judgment the plaintiffs appealed.

Norman McKenzie, K.C., for plaintiffs.

J. T. Brown, K.C., for defendant.

The judgment of the Court (WETMORE, C.J., PRENDERGAST, NEWLANDS, JOHNSTONE, and LAMONT, JJ.), was delivered by

NEWLANDS, J.:—The following proposition, which is laid down in 26 Cyc., p. 1040, is, I think, a correct statement of the law as applicable to cases of this kind: "A breach of the

contract of employment other than by quitting the service may prevent a recovery of any wages thereunder, as where the employee embezzles the money of his employer, or commits other criminal offences, although not immediately injurious to the person or property of the employer."

In Callo v. Brouncker, 4 C. & P. 517, where a yearly servant was dismissed before the expiration of the year, and the servant sued for his wages, Parke, J., told the jury that "there was an implied agreement that, if there was any moral misconduct, either pecuniary or otherwise, wilful disobedience or habitual neglect, the defendant should be at liberty to part with the plaintiff."

The same principle is laid down by Lord Tenterden, C.J., in Atkins v. Acton, 4 C. & P. 208, Turner v. Robinson, 6 C. & P. 151, Cunningham v. Fanblanque, ib. 44, and numerous other cases, all going to shew that gross immoral conduct on the part of the servant is a breach of his contract which entitles the master to dismiss him.

In this case the servant was not dismissed, because the master (the defendant) knew nothing of the seduction of his daughter until after the completion of his term of service. This, however, makes no difference, because , as found by the District Court Judge, "the defendant in no way condoned the offence or waived the forfeiture. So soon as he discovered the offence he laid an information." Nor does the fact that the wages were due periodically, as the District Court Judge has also found that the immoral acts of the servant commenced in the winter of 1907-8, and continued to July, 1908, at least, and that there never was a time from the date the service commenced on 23rd March, 1908, to the date Holloway left, that he was not liable to be dismissed for cause.

Grossly immoral conduct is, as I have said, a breach of the contract of service, and I know of no immorality on the part of a servant more gross nor more detrimental to the interests of his master than the seduction of his daughter, who, in this case, was only 14 years of age. The servant having broken his contract, and that breach not having been waived, he cannot recover, and, as the grossly immoral conduct was continued during the whole term of service, it is a defence to his whole claim for wages, that is, he broke his contract each month, and therefore never earned a month's or any wages.

In Brown v. Croft, C. & P. 174 n., Lord Tenterden, C.J., ruled that if a servant habitually embezzled his master's

property the amount embezzled is wholly immaterial; and, although the arrears of wages sought to be recovered may exceed the amount embezzled, the servant is not entitled to anything—shewing, I think, that damages for the embezzlement are not to be set off against the wages that would otherwise be due, but that no wages were due at all on account of the breach of contract by the servant.

An American case was cited on the argument where the law laid down is similar to what I have stated, and, as Brown v. Croft is given as the authority for the proposition there contained, it bears out the interpretation I have put on that case. This case is Turner v. Kouwenhoven, 100 N. Y. 115, where Miller, J., at p. 119, says: "The rule is well settled in this State that if the master, for good and sufficient cause, discharges the servant before the expiration of the term of service, or if the servant, without good cause, quit the service before the end of the term, he can recover nothing for the part of the term past, nor for the future. But, where the servant has served his full term, this rule has no application, and has never been upheld by the decisions of the Courts. Cases may, no doubt, arise where the dishonesty of the servant is of such a character as would justify the conclusion that his contract had been violated in a most material and substantial part and to an extent which would bar any recovery whatever, but the act in such cases, to bar a recovery, must be misconduct and unfaithfulness which substantially violates the contract of service."

In an American case, Peterson v. Mayer, 46 Minn. 468, Mitchell, J., says: "The allegations of the complaint are that the plaintiff performed labour and work for defendant for 7 and a fraction months at an agreed sum per month, payable at the end of each month. The answer admits the employment at the sum alleged for each and every month that plaintiff should work for the defendant, and that the plaintiff worked the length of time stated, but alleges, by way of defence, that during all the time of his service the plaintiff stole and appropriated to his own use large sums of defendant's money which came into his hands in the course of his employment, and that, as soon as defendant discovered the fact, he discharged the plaintiff from his service.

"While the whole services were not performed under one entire contract, yet, as to each and every month by itself, the contract was an entire one, viz., to work an entire month

for an entire price. A contract to pay a certain sum for a month's service is as entire in its consideration as is a contract to pay a certain sum for a single chattel: Beach v. Mullin, 34 N. J. Law 343. Therefore, to entitle plaintiff to recover the specified wages for one month, he must have substantially performed the contract of service for that month. According to the settled doctrine of this Court, had plaintiff, before the expiration of the month, abandoned the service without excuse, and by his own wilful fault, he could have recovered nothing for the portion of the month he worked, because he would not in such case have performed his contract: Nelichka v. Esterly, 29 Minn. 146 (12 N. W. Repr. 457); Kohn v. Fandel, 29 Minn. 470 (13 N. W. Repr. 904.) The same result would have followed, and on the same ground, had the defendant during the month, for good and sufficient cause, discharged the plaintiff from his service. But it was an implied condition of the contract that plaintiff should serve the defendant faithfully and honestly. Although only implied, this was as much a part of the contract as was the express condition as to the time of service, and the breach of the one was just as much a failure to perform the contract as would have been a breach of the other, and the consequences in both cases would be the same. Indeed, if there is any case on non-performance of an entire contract which should prevent a recovery, it is where a servant has been habitually embezzling his master's money which came into his hands in the course of his employment; for, in such cases, not only is the breach the result of positive dishonesty, but it goes to the very root of the subject-matter of the contract of service."

The law being the same in this province, the above reasons apply equally to this case, and I am therefore of the opinion that Holloway never earned any wages, and that there was nothing for him to assign to the plaintiffs, and that the judgment of the District Court Judge should be affirmed with costs.

SASKATCHEWAN.

NOVEMBER 20TH, 1909.

FULL COURT.

CANADIAN PACIFIC R. W. CO. v. FOREST CITY PAVING AND CONSTRUCTION CO.

Railway—Carriage of Goods—Action for Freight—Contract —Liability of Consignee to Pay Freight—Delivery of Goods as Required by Consignee — Completion of Contract of Carriage.

Appeal by the plaintiffs from the judgment of RIMMER, DIST. CT. J., dismissing an action for freight on goods carried from Owen Sound to Regina. The defence was that the goods were not carried for the defendants, but by virtue of a contract entered into between the plaintiffs and the Imperial Cement Company Limited, and that the goods were never delivered to the defendants.

J. A. Allan, Regina, for plaintiffs.

T. S. McMorran, Regina, for defendants.

The judgment of the Court (WETMORE, C.J., NEWLANDS, JOHNSTONE, and LAMONT, JJ.), was delivered by

NEWLANDS, J.:—The facts are briefly that in the fall of 1907 the defendants purchased from the Imperial Cement Co. at Owen Sound, Ontario, 1,200 bags of cement, which were shipped by the vendors to the defendants at Regina by the plaintiffs' railway. The shipping bill was signed by the Imperial Cement Co. as consignors, and by the agent of the plaintiffs at Owen Sound, and the goods were consigned to the defendants at Regina. Under these circumstances, to use the words of Mellor, J., in Cork Distilleries Co. v. Great Southern and Western R. W. Co., L. R. 7 H. L. at p. 277, approved of by the House of Lords: "There is evidence in the present case that these goods were, with the consent or by the authority of the purchaser, consigned by the vendors, as consignors, to be carried by the plaintiffs as common carriers to be delivered to the purchaser, as consignee, and that

the name of the consignee was made known to the plaintiffs at the time of the delivery. Under such circumstances the ordinary inference is that the contract of carriage is between the carrier and the consignee, the consignor being the agent for the consignee to make it."

The remedy of the common carrier in such a case is "by enforcing his lien upon the goods or by bringing an action on the contract against any one who, at the time when the goods were shipped, was a party to the bill of lading, either as being on the face of it a contracting party or as being an undisclosed principal of such a party:" Sewell v. Burdick, 10 App. Cas. 74, at p. 91.

It therefore only remains for me to consider whether the plaintiffs have earned the freight sued for by completing the contract of carriage. A term of the contract is: "The delivery of the goods shall be considered complete, and the responsibilities of the company shall terminate, when the goods are placed in the company's sheds or warehouse (if there be convenience for receiving the same) at the final destination, or when the goods shall have arrived at the place to be reached on the company's railway." The defendants had been receiving shipments of cement all summer by the plaintiffs' railway, and it had not been the custom to put the same in the freight sheds. The defendants' manager at Regina gave the following evidence: "Q. Then you had requested them—you said so yourself—to place the first ones at Miller's track? A. Yes, sir. Q. That is right, is it? A. Yes. Q. And you requested them to place the subsequent ones on the track opposite the Independent Lumber Company's premises? A. Well, I could not say that it was a request on my part. That was probably because it was just as handy for them as it was for me. Q. It was at all events consented to by you? A. It was consented to by me, yes. That is, when the cars came in, I accepted them on that siding."

I think, therefore, the plaintiffs completed their contract and earned the freight sued for by putting the cars containing said goods upon this track, as it was proved at the trial they had done, and of which fact they notified the defendants.

What happened after the placing of the cars on this track and notifying the defendants is, I think, not material to this action, as there is no claim on the part of the defendants for damages against the plaintiffs for negligence in allowing the

Western Supply and Agency Company to take away such goods without paying the freight, nor was there any evidence that the plaintiffs had entered into a new contract with the Western Supply and Agency Company by which said company became liable for the freight, and the defendants released from their obligation to pay the same. The learned trial Judge properly ruled out secondary evidence of the order given by the defendants to the Western Supply and Agency Company, requesting the plaintiffs to deliver these goods to them upon their paying the freight, and, even if this order had been produced, it was proved that the plaintiffs had never seen the same, and that the Western Supply and Agency Company took the goods without their knowledge, and therefore there was no consent on the part of the plaintiffs to any such agreement: Lewis v. McKee, L. R. 4 Ex. 58. I cannot, therefore, agree with the finding of the learned trial Judge that "in allowing the Western Supply Company to take the goods the plaintiffs entered into a fresh contract and discharged the defendants, even if they were under an implied contract to pay the freight, in view of the express terms of the bill of lading."

The appeal should, in my opinion, be allowed with costs.

SASKATCHEWAN.

NOVEMBER 20TH, 1909.

FULL COURT.

CANADA LIFE ASSURANCE CO. v. VANCE.

Mortgage — Originating Summons for Foreclosure — Order for Sale instead of Foreclosure—Absence of Request — Imperial Chancery Act, 15 & 16 Vict. ch. 86, sec. 48.

Appeal by the plaintiffs from an order of LAMONT, J., in Chambers, upon the return of an originating summons for foreclosure, directing a sale of the mortgaged lands.

A. Ross, Regina, for the plaintiffs.

J. E. Doerr, Regina, for the defendant W. S. McCutcheon.

No one appeared for the other defendant.

The judgment of the Court (WETMORE, C.J., PRENDERGAST, JOHNSTONE, and LAMONT, JJ.), was delivered by

JOHNSTONE, J.:—The appellants, mortgagees under the Land Titles Act of 1904 of the defendant Vance, who was then in default, on the 23rd December, 1908, obtained an originating summons in Chambers calling upon the mortgagor and his co-defendant, a creditor, to appear on an application to be made in Chambers, on the appellants' behalf, for an order foreclosing the interest of the defendants in the lands in question.

From the affidavit of one Young, the plaintiffs' manager in Winnipeg, which affidavit was used in support of the application for the originating summons, it appears that there was then due the plaintiffs less than $1,000, and the lands covered by the mortgage were worth $1,850.

On the return of this summons the learned Judge refused to order foreclosure, and made an order that, in default of payment of principal, interest, and costs, at the date fixed for the payment thereof, the lands be sold at public auction. From this order the plaintiffs appealed. There was no request by the mortgagees or any subsequent incumbrancer or of the mortgagor, or any person claiming under them, to the Judge, at the hearing, to direct a sale instead of foreclosure.

By the Chancery Act of 1852, 15 & 16 Vict. ch. 86, sec. 48: "It shall be lawful for the Court in any suit for the foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee, or of any subsequent incumbrancer, or of the mortgagor, or any person claiming under them respectively, to direct a sale of such property, instead of a foreclosure of such equity of redemption, on such terms as the Court may think fit to direct, and, if the Court shall so think fit, without previously determining the priorities of incumbrancers, or giving the usual or any time to redeem; provided that if such request shall be made by any such subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the Court shall not direct any such sale, without the consent of the mortgagee or the persons claiming under him, unless the party making such request shall deposit in Court a reasonable sum of money, to be fixed by the Court, for the purpose of securing the performance of such terms as the Court may think fit to impose on the party making such request."

Subject to the provisions of this section, the mortgagee had, except in a few cases by reason of the existence of special circumstances, as, for instance, in the case of infants, a strict right to foreclosure.

Under the section referred to, the request from some one of the persons named for a sale instead of foreclosure, was a condition precedent to the making of the order.

I think the appeal should be allowed with costs. Such costs to be added to the appellants' claim.

SASKATCHEWAN.

NOVEMBER 20TH, 1909.

FULL COURT.

BOYD v. NAISMITH.

Landlord and Tenant—Agreement for Lease—Possession—Subsequent Agreement under Seal—Operation as Lease—Surrender of Previous Tenancy—Overholding Tenant—Detention of Premises.

In this action the plaintiff sued the defendant for $275 for breaking and discing land and for damages for the conversion of wheat and the removal of buildings. The defendant denied that the plaintiff did any breaking or discing for him, denied the conversion of the wheat, and alleged that, if he did remove the buildings set out in the statement of claim, he had a right so to do, as he was the owner of the land on which the buildings were, and that the plaintiff was, at the time of the removal, merely an overholding tenant. The defendant also counterclaimed for: (1) possession of the land; and (2) $600 damages for the wrongful detention of the same by the plaintiff.

The action came on for trial before RIMMER, District Court Judge for the judicial district of Cannington, who gave judgment for the plaintiff for $37.50 damages for conversion of wheat and removal of buildings, and dismissed the counterclaim of the defendant with costs. From the part of his judgment dismissing the defendant's counterclaim the defendant appealed.

The appeal was heard by WETMORE, C.J., PRENDERGAST, NEWLANDS, JOHNSTONE, and LAMONT, JJ.

J. T. Brown, K.C., for defendant.

F. W. G. Haultain, K.C., for plaintiff.

LAMONT, J.:—The facts of the case, as disclosed by the evidence, are simple. On the 10th October, 1905, the plaintiff and the defendant entered into the following written agreement:—

"Alameda, Oct. 10, 1905.

"This is to certify that John Naismith agrees to rent the south-east ¼ s. 7-4, R. 2, to John Boyd, for the term of ten years at the following terms:—

"First year, $200.00; second, $250.00, and $300.00 a year for the following eight years to be payed October 1st. Signed and agreed to by

"John Naismith.
"John Boyd."

This agreement was not under seal, and therefore could only operate as an agreement for a lease, but the plaintiff took possession under it and farmed the land during the season of 1906. When the first year's rent became due, the plaintiff did not have the money wherewith to meet it, so he gave the defendant his promissory note therefor. When the note fell due, it was also not paid. This state of affairs continued until near seeding time in the spring of 1907, when the defendant threatened to lease the land to some one else. Early in May, 1907, the plaintiff and defendant met, and the following agreement under seal was entered into between them:—

"Memorandum of Agreement entered into this eighth day of May, 1907, A.D., between John Naismith, farmer, of Alameda in the province of Saskatchewan, of the first part, and John Boyd, farmer, of Alameda, in the province of Saskatchewan, of the second part.

"The party of the first part agrees to rent to the party of the second part for one season ending December 31st, 1907, the S. E. ¼ of section 7, tp. 4, range 2, west of the second meridian.

"The party of the second part agrees to pay and the party of the first part agrees to accept as payment for rent of the said quarter section one-half of the wheat crop grown

on said land as payment in full for rent for this season mentioned and also in full payment for the amount due the party of the first part for rent due for 1906. One-half of the crop so grown to be delivered at one of the elevators in Alameda in the name of the party of the first part, free of all cost to him. On the delivery of such portion of the crop, the party of the first part agrees to deliver to the party of the second part the note held by him for rent due and payable in the year 1906.

"In witness whereof the parties aforesaid have hereunto set their hands and seals in the presence of

"Sim. A. Goldston. "John Naismith [L.S.]
"John Boyd [L.S.]"

For the defendant it was contended that this document was a valid lease, and that its effect was to work by operation of law a surrender of the agreement of the 10th March, 1905. For the plaintiff it was contended that it effected no surrender of the agreement of the 10th March, but was merely an arrangement of the payments to be made for the two years 1905 and 1906.

The first question for consideration therefore is, was the document of the 5th May, 1907, a valid lease?

I am clearly of opinion that it was. It was under seal and contained all the essentials of a lease. See Woodfall on Landlord and Tenant, 17th ed., p. 143. The only essential which it seems to me might be argued as being wanting is that it does not set out the date on which the term is to begin. This objection, however, is effectually disposed of in Marshall v. Berridge, 19 Ch. D. 233, where the Master of the Rolls, while holding that in an executory agreement for a lease there is no inference that the term is to commence from the date of the agreement, in the absence of language pointing to that conclusion, says at p. 239: "No doubt there is abundant authority for saying that if on a given day A. agrees to let and B. agrees to take a house, and that operates as a lease or present demise at law, then of course the words, being in the present tense, relate to the date of the instrument, and the term commences from that date."

The document of the 5th May being a valid lease, does it by operation of law effectuate a surrender of the tenancy under the agreement of the 10th March, 1905? In Lyon v. Reed, 13 M. & W., Parke, B., lays down the law on the point at p. 305 as follows: "The term 'surrender by act and

operation of law' is applied to cases where the owner of a particular estate has been a party to some act the validity of which he is, by law, afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if the lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had no power to make the new lease, and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. . . . In such case it will be observed there can be no question of intention. The surrender is not the result of intention. It takes place independently, and even in spite of intention."

In Caverhill v. Orvis, 12 C. P. 392, the facts resembled those of the case at bar. There one Lynde, on the 31st October, 1857, signed a paper not under seal by which he let the premises in dispute to Selah Orvis for 5 years. On the 31st March, 1858, Lynde mortgaged the premises to the plaintiff. On the 8th June, 1858, by an indenture under seal signed by both parties, Lynde demised and leased to Selah Orvis the said premises for 5 years from the 31st October, 1857. In January, 1862, default having been made in the payment of the money secured by the mortgage, the mortgagees brought an action of ejectment against Selah Orvis. Draper, C.J., after holding that the instrument of the 31st October, 1857, not being under seal, was void as a lease, but that under it the defendant became tenant from year to year, said: "Still the question remains as to the effect of the lease of June 8th, 1858, which was made by deed. As between Lynde, the mortgagor, and the lessee, the now defendant, it seems to me it put an end to the tenancy from year to year."

See also Fenner v. Blake, [1900] 1 Q. B. 426; Woodfall on Landlord and Tenant, p. 334.

In view of the law that the acceptance of a valid new lease implies the surrender of an existing lease, it is unnecessary to consider whether, under the agreement of the 10th March, the plaintiff held the premises as a tenant at will or from year to year or according to the terms of the agreement. None of these can be a higher form of tenancy than that under a valid lease. Therefore, no matter what the tenancy of the plaintiff under the agreement of the 10th

March may have been, he having accepted a subsequent valid lease, his tenancy under the former agreement becomes surrendered by act and operation of law. Under the lease of the 5th May, the term came to an end on the 31st December, 1907, and the plaintiff thereafter had no right to the premises. premises.

The next point to determine is whether or not the plaintiff retained possession of the premises, and thus became an overholding tenant. The evidence shews that the plaintiff did not crop the land after 1907. He says the reason he did not do so was that the plaintiff forbade his going on the land. The plaintiff was under the impression that he had a right to hold the land for the balance of the 10 years provided for under the first agreement. The defendant evidently thought the tenancy was determined on the 31st December, 1907, for in his evidence he stated that in the latter part of October of that year he leased the said lands to one Deering, whose term was to commence in the spring of 1908. He also stated that Deering put his stock on the land in the fall of 1907, and he (defendant) moved the buildings for his convenience. Under these circumstances, can it be said that the plaintiff is in possession of the land? I am of opinion that it cannot. In Clarke on Landlord and Tenant, p. 715, the learned author says: "If, at the expiration of the term, the tenant and his family have gone away from the house, and the house is locked up, no one being in possession, the landlord would be justified in breaking into the house forcibly and obtaining possession."

In the present case the tenant and his family were not living upon the land, and, so far as physical possession was concerned, the land was vacant. The defendant, therefore, was entitled to enter upon it and take possession. The reletting of the premises to Deering, the placing by Deering of his cattle on the land, and the moving of the buildings by the defendant for Deering's convenience, seem to me unquestionably to be a taking possession of the premises by the defendant, and this he had a perfect right to do, since the tenancy was at an end. The tenancy having been determined, the landlord having resumed possession of the premises, and the plaintiff not being again in physical possession of the property, no action will lie against him as an overholding tenant.

The defendant, therefore, is not entitled to either of the remedies for which he asks in his counterclaim. He is not entitled to possession, because he has had it since the 31st December, 1907; and he is not entitled to damages, because there was no detention of the premises by the plaintiff.

The decision of the learned District Court Judge must therefore be affirmed and the appeal dismissed.

PRENDERGAST, NEWLANDS, and JOHNSTONE, JJ., concurred.

WETMORE, C.J.:—I have arrived at the same conclusion in this case as my brother Lamont, but I will confine my reason for doing so to one ground only. I do not wish to be understood as dissenting from the judgment of my brother Lamont, but I would rather not, at present, express any opinion as to the agreement of the 10th October, 1905. amounting, in the circumstances, only to an agreement for a lease. It is not necessary for me to do so.

I am of opinion that the evidence does not establish that the plaintiff was, at the commencement of this action, in actual possession of the property. In fact, the inference is that he was not.

The evidence further shews that the defendant leased the property to one Deering in October, 1907, to commence in the spring of 1908. Then Deering put his cattle on the property, and, for all the evidence shews to the contrary, Deering has never been disturbed and is in possession yet.

The evidence is not clear when these cattle were put on the property. The defendant's evidence is (speaking at the trial) that he put them in "last fall." When that was is not very clear, because I cannot find when the action was tried, and the onus was on the defendant to shew that the plaintiff was an overholding tenant. The judgment is dated the 4th December, 1908.

I think, however, the weight of evidence, according to the appeal book, is that Deering put them on the property in the fall of 1907. The plaintiff has never done anything on the land since the 31st December, 1907, or been there, so far as the evidence shews.

For these reasons, I am of opinion that the defendant cannot maintain his counterclaim, and that his appeal should be dismissed with costs.

SASKATCHEWAN.

NOVEMBER 20TH, 1909.

FULL COURT.

BURTON v. MERCHANTS BANK OF CANADA.

Husband and Wife — Business Carried on by Husband in Firm Name — Seizure of Stock in Trade under Execution — Claim of Ownership Made by Wife — Interpleader Issue — Evidence — Finding that Business that of Husband.

Appeal by the plaintiff, claimant, from the judgment of NEWLANDS, J., in favour of the defendants, execution creditors, in an interpleader issue.

J. F. L. Embury, Regina, for the plaintiff.

J. A. Allan, Regina, for the defendants.

The judgment of the Court (WETMORE, C.J., PRENDERGAST, JOHNSTONE, and LAMONT, JJ.), was delivered by

WETMORE, C.J.:—The Merchants Bank having obtained judgment and issued execution against one William Burton, the sheriff seized under it certain property situated in a store in which the business was ostensibly carried on under the name of Burton Brothers.

The plaintiff, Augusta H. Burton, claimed this property, and an interpleader issue was directed for the purpose of trying out the right of property.

William Burton, the execution debtor, and one George Burton started business as tailors in Regina, under the name of Burton Brothers. Some fifteen years ago they failed, and assigned for the benefit of their creditors. It is alleged that from the time of this assignment the plaintiff, Augusta H. Burton, who is the wife of William Burton, carried on this business, or rather that it was carried on for her; that the name was changed from Burton Brothers to Burton Brothers & Co.; and that Burton Brothers & Co. consisted only of Augusta H. Burton.

There was no outward change which would inform the general public that there was any change in the business.

The business was started with the assignment and carried on with the tools and property which were exempt from seizure at the time the assignment for the benefit of creditors was made, and therefore did not pass under that assignment. All the property that passed under the assignment was taken away.

Mrs. Burton put no money into the business whatever, and any stock that was subsequently accumulated was got by means of the work that was done by William Burton. I may say that shortly after the assignment George Burton left Regina, and it is practically conceded on the part of Burton and his wife that he has now no interest in the business.

Mrs. Burton has taken no part in the business whatever. No registration has taken place setting forth that she is Burton Brothers & Co. William Burton used the money which was taken in just as he pleased without reference to her. If he entered into any contracts or dealings for himself, he paid for them out of the moneys of the business. He signed drafts and cheques, and all that Mrs. Burton did was to sign promissory notes. Mrs. Burton has no knowledge of the business whatever, no knowledge of its affairs; and no accounting was ever made to her. I may say, in short, that, so far as any knowledge on her part in connection with the business is concerned, she might as well have been a perfect stranger. She did not even seem to know that she had put in a claim for the property when it was seized by the sheriff. She was told by her husband to sign something, and she did it. I cannot find, in so far as the goods that were seized are concerned, that they were sold to her on her credit. There was an affidavit put in at the trial, made by one Gaunt, in which he deposed that he was a member of the firm of Mark Fisher Sons & Co., wholesale merchants; that during the last 6 years the firm had sold during each of those years a bill of goods to Augusta H. Burton, carrying on business at the city of Regina as a merchant tailor, under the firm name of Burton Brothers; and that during that time there had been sold to Augusta H. Burton goods to the extent of $5,000.

As appears by the appeal book, the learned trial Judge, when that evidence was offered, stated that it was inadmissible. I am of opinion that he was entirely right in so holding, but, nevertheless, it forms part of the appeal book. No objection was taken on the appeal to its reception, and

counsel for the respondents, the bank, seemed, on the argument, to deal with it as if it had been received. Leaving that affidavit out, there is absolutely no evidence that any goods were sold to Mrs. Burton, on her credit, either as Burton Brothers & Co. or otherwise. But, assuming it to have been received in evidence, and that I am at liberty to look at it, it does not go far enough, in my opinion, to establish that these goods were sold on the credit of Mrs. Burton. Why would they sell them to her as Burton Brothers? She was not registered as being Burton Brothers, or Burton Brothers & Co. How did the wholesale firm come to sell goods on her credit? Was it at her request? Was it at the instance of William Burton, or how was it brought about? It seems to me that this statement is merely a conclusion of the deponent in his mind. The evidence would seem to establish, at least there is evidence to warrant a finding, that upon the failure of Burton Brothers the business was carried on by William Burton with the exempted property that I have mentioned; that he was the sole person concerned in the business, in so far as the general public was concerned. Augusta Burton's name did not appear in connection with it at all, or, in other words, so far as the public was concerned, the business was, from the time of the assignment, carried on by William Burton alone; and I should say that the learned trial Judge has substantially found that.

No question arises here with respect to a wife carrying on business or owning property, separate and apart from her husband, in so far as personal property is concerned. Chapter 47 of the Consolidated Ordinances was repealed by sec. 3 of ch. 18 of the Acts of 1907. Section 4 of that Act provides that "all the wages and personal earnings of a married woman, whether married before or after the passing of this Act, and any acquisitions therefrom, and all proceeds or profits from any occupation or trade which she carries on separately from her husband . . . and all investments of such wages, earnings, money, or property, as well as all property, real or personal, held and enjoyed by a married woman at the time of the passage of this Act, or which shall hereafter be acquired by her, shall be free from the debts or disposition of her husband, and shall be held and enjoyed by her and disposed of without her husband's consent as fully and freely as if she were unmarried."

It will be observed that in this section all property, real or personal, held and enjoyed by a married woman at the time of the passing of the Act, shall be free from the husband's debts or dispositions, and held and enjoyed by her as fully and freely as if she were unmarried.

The property in question, if it really belonged to her, was acquired before the passage of the Act, and therefore the provisions of ch. 47 of the Consolidated Ordinances would apply to it. The provisions of ch. 47 are as follows: "A married woman shall in respect of personal property be under no disabilities whatsoever heretofore existing by reason of her coverture or otherwise, but shall in respect of the same have all the rights and be subject to all the liabilities of a feme sole."

This enactment was first made in 1890 (see No. 20 of that year), and consequently before the assignment by Burton Bros.

Consequently, many of the decisions in the Courts of Upper Canada and Ontario are not applicable to this case. provided that the effect of the Ordinance was to vest this property in her.

The strongest case for the plaintiff that I can find is Dominion Savings and Investment Society v. Kilroy, 15 A. R. 487. In that case the husband had become insolvent. He made an arangement with a wholesale firm to supply goods to his wife upon her own credit and responsibility, and the goods were supplied accordingly, and therewith the business was carried on in her name. She had no capital of her own. The husband, under power of attorney from the wife, managed the business (and in this case the husband had also a power of attorney from the wife to manage the business). The goods were sold and further goods obtained from time to time on a like credit and responsibility. For some of the facts of the case I also refer to the same case reported in 14 O. R. 468. The goods forming the stock-in-trade were seized under an execution against the husband. The Court of Appeal held that, inasmuch as the evidence established that the goods were sold to the wife, that the vendor sold to the wife and would not give credit to the husband, and that inasmuch as sec. 5 of R. S. O. 1877 ch. 125 enabled the wife to hold and enjoy her personal property, whether owned by her before marriage or acquired by her by inheritance. bequest, or gift, or as the next of kin to an intestate, or in

any other way after marriage, free from the debts and obligations of her husband, the only exception being property received by her from her husband during coverture, the property was vested in the defendant and was not liable to be taken under execution at the suit of her husband's creditors.

Now there are two or three distinctions which I make between the facts of that case and those of this. In the first place, in the Ontario case the business was carried on in the wife's name. In the next place, it was established that the wholesale dealers would not have given credit to the husband by reason of his insolvency. They would not have sold to him at all.

In this case the husband apparently continued carrying on the business just as he did before, except that George Burton went out; he practically carried on the business under the same name, for the change from Burton Bros. to Burton Bros. & Co. would give no intimation to the public that there was any change in the business as to the persons that owned it, or otherwise, especially of the character set up by the plaintiff. Then there is the manner in which the husband dealt with the proceeds of the business, and there is no evidence that the property seized by the sheriff was the property sold to the plaintiff. As pointed out, the only evidence bearing upon this particular fact is the testimony in the affidavit of Gaunt. Assuming that to be admissible testimony, it does not appear anywhere in the evidence that the property seized was a portion of the property sold by Mr. Gaunt's firm.

In Dominion Savings and Investment Society v. Kilroy, 15 A. R., Burton. J.A., at p. 489, lays down the following: "There is always the risk of a jury finding that the transaction is colourable, and the moneys advanced by the husband; that is a risk to which she may be unfortunately exposed; but where, as in the present case, the evidence clearly establishes that the merchant furnishing the goods would not have intrusted them to the husband, knowing that he was insolvent, but was willing to sell them to the wife; nothing but a process which I am almost inclined to speak of as legerdemain, could transfer that property to the husband and make it liable for his debts."

The question then is one of fact. Was this transaction one that was merely colourable? Was the business really that of the husband? I may say, in addition to what I have stated before, as distinguishing this case from Dominion Savings and Investment Society v. Kilroy, that in this case the husband used the moneys derived from the business for his own purposes without reference to his wife and without consulting with her, and that this very business was commenced by the husband by means of the property exempted from the assignment at the time he failed. This is an important element, in my opinion, in considering this case, and, although the learned trial Judge did not state in express words that he found just as I have stated, the only conclusion to be drawn from his judgment is that he did so find. I say again, it is entirely a question of fact, and, there being evidence to warrant the learned trial Judge in coming to the conclusion that he did, I am not disposed to interfere with his judgment. I have stated that Mrs. Burton put no money into the business. I point to that as a question of fact. There was some evidence given at the trial by the husband that she put the moneys of the sale of some real estate owned by her into it. The evidence on behalf of the plaintiff was by no means satisfactory, especially so in resepct to the matter I am now dealing with. The plaintiff was examined for discovery, and she then testified that she put no money into the business. Her husband, on his examination for discovery, testified that no money was put into the business since it started except what was made out of it. It was only at the trial that he testified that the plaintiff put the proceeds of the sale of the real estate into it. It seems to me that there was an afterthought; it was brought out in cross-examination by the defendants' counsel. It must have struck the plaintiff's counsel with surprise; he could not have been aware of the fact before; otherwise I cannot understand how he omitted to bring such an important piece of testimony out in the examination in chief. I think where these relations exist between husband and wife as in this case, and it is alleged that a business has been acquired by the wife in the manner as set up, the assertion of the ownership of the property by the wife should as a rule be instant and open; that the business should not be carried on so far as the public is concerned ostensibly by the husband; otherwise it must inevitably create more than suspicion of the bona fides of the transaction.

I think the appeal should be dismissed with costs.

SASKATCHEWAN.

NOVEMBER 20TH, 1909.

FULL COURT.

RE GAAR SCOTT CO. AND GIGUERE.

Land Titles Act—Caveats—Motions to Set aside—Summary Procedure — Discharge of Caveats — Discretion—Mortgage of Homestead—Execution—Title Registered in the Name of another Person—Mistake in Name—Amendment.

Prudent Giguère, otherwise known as James Gear, the respondent, took out a summons under sec. 140 of the Land Titles Act, calling upon the Gaar Scott Company, the appellants, to shew cause why two caveats filed by them against the south-west quarter of 36-12-24 W-2, should not be withdrawn. These caveats were filed, the first under a certain mortgage made by Prudent Giguère to the Gaar Scott Co. dated the 10th December, 1907, and the second under a certain execution for the sum of $1,052.93 issued out of the Supreme Court for the Judicial District of Regina, on the 30th November, 1908, in an action wherein the Gaar Scott Company were plaintiffs and James Gear was defendant. After hearing the parties and the evidence produced by them, JOHNSTONE, J., ordered the caveats to be discharged.

From this order the Gaar Scott Co. appealed on the grounds:—

1. That the learned Judge erred in disposing of the matters in question summarily.

2. Because he erred in not allowing the caveats to remain registered against the lands until the caveators might have an opportunity of bringing action to substantiate the claims therein made.

3. Because he did not allow the caveators sufficient time to obtain proper material to substantiate the claims therein made.

W. B. Scott, Regina, for the appellants.

W. B. Willoughby, Moose Jaw, for the respondent.

The judgment of the Court (WETMORE, C.J., PRENDERGAST, NEWLANDS, and LAMONT, JJ.), was delivered by

NEWLANDS, J.:—As to the first and second grounds of appeal, sec. 140 provides "that the Judge may, upon proof that the caveator has been summoned, and upon such evidence as he requires, make such order in the premises as to him seems fit."

Although this section gives a very wide discretion to the Judge, it does not, in my opinion, confer upon him the powers of the Supreme Court to decide upon legal or equitable rights between the parties, but only the jurisdiction to decide whether the caveator had any right to file the caveat in question, and, if he had at the time of filing such right, whether he had at the time of the application the right to have the caveat continued against such property. If there is a bona fide question of law or equity, as to the right of the caveator to the estate or interest which he claims under the caveat, to be decided, the Supreme Court is the proper place for such question to be disposed of, and the caveat should be continued a sufficient time to allow an action to be brought in which to decide such question.

All the cases cited by the appellants bear out this proposition.

In In re Wark (unreported) the Chief Justice said: "If the material before me was of such a character as to satisfy me clearly and beyond all doubt that the caveator had no rights with respect to the property, I would, I think, be justified in directing that the caveat be removed; but where there is a fair bona fide ground for setting up his alleged right, the Court is the proper jurisdiction to deal with the question (not a Judge proceeding under the Act) in an action properly instituted for the purpose. I am therefore of the opinion that my duty is to maintain the status quo between the parties and to continue the caveat."

In Re Webster and Canadian Pacific R. W. Co., 6 W. L. R. 384, Scott, J., held that the question was so important that he should not dispose of it on such an application, and continued the caveat for one month to allow the necessary proceedings to be taken; and in Re Riddock and Chadwick's Contract, 6 W. L. R. 360, Stuart, J., ordered pleadings to be delivered and the application set down for trial. All these cases go to shew that it is in the discretion of the Judge as to

whether he will dispose of the matter summarily on an application under sec. 140, or continue the caveat to allow of an action being brought to determine the rights and interests of the respective parties, and that the latter course should be taken where there is any question as to the rights and interests of the parties.

Here, however, there is no such question. As to the first caveat the appellants claim under a mortgage made by the respondent. This mortgage is stated in the caveat to have been made on the 10th December, 1907. It was proved before the Judge who heard the application that the land contained in this mortgage was a homestead, taken up by the respondent under the provisions of the Dominion Lands Act, and that the respondent did not get his patent from the Crown for this land until the 13th February, 1909.

It was decided by this Court in banc in Re International Harvester Co. of America and Ebbing, 11 W. L. R. 29, that the registrar should not register such a mortgage by way of caveat. As my brother Lamont in that case said (p. 57): "Where, therefore, there is presented to the registrar for registration a mortgage, or a caveat founded thereon, affecting lands the patent for which is not of record in his office, the registrar is entitled to refuse to register the mortgage or file the caveat unless the applicant first satisfies him by affidavit, in form K., that the mortgagor is entitled to create the mortgage, and in case the mortgagor mortgages land entered for by him as a homestead or pre-emption under the Dominion Lands Act, the affidavit must also state that he has been recommended for patent and has received his recommendation in accordance with the provisions of the said Act." In this case there was no evidence either that such an affidavit was made, or that the mortgagor had been recommended for patent, the land being his homestead under the Dominion Lands Act; and the fact that it had to be registered by way of caveat shews that the provisions of the Act for filing it were not complied with. It was, therefore, the duty of the registrar to have refused to file this caveat, and, that being the case, the learned Judge was right in summarily disposing of it and ordering its discharge.

As to the caveat filed under the execution against the land of the respondent, sec. 136 of the Land Titles Act provides that "any person claiming to be interested under an execution where the execution creditor seeks to affect land in

which the execution debtor is interested beneficially, but the title to which is registered in the name of some other person or otherwise, may file a caveat."

The land in question was registered in the name of Prudent Giguère. The execution was against James Gear. The execution debtor swears that he was known by that name, but that his proper name was Prudent Giguère. Now this land was not, strictly speaking, registered in the name of some other person, because James Gear and Prudent Giguère are the same person, but, as far as the land titles office was concerned, it was registered in the name of "some other person," as they could not recognise these two names as belonging to one and the same person, and therefore as to the execution against James Gear the land which was registered in the name of Prudent Giguère was registered in the name of some other person. Besides, the words "or otherwise" must be given some meaning, so that if in this case the land is not actually registered in the name of some other person, it seems to me that these words extend the right to file a caveat to cases where the execution creditor is interested in land the title to which is registered otherwise than in the name of some other person, which would make the provision applicable to this case, and give the Gaar Scott Company the right to file this caveat.

That being the case, I do not think the learned Judge should have summarily disposed of this application, but should have continued it long enough to allow the execution creditor to have the proceedings in the suit of Gaar Scott Co. v. James Gear amended by the insertion of the proper name of the execution debtor.

The question as to whether it was his homestead, and therefore exempt from execution, is not, I think, a question that should be decided upon such an application, but only in an action brought for that purpose, and therefore I have not considered that question.

The appeal should be allowed with costs, as to the caveat filed under the execution, and that caveat continued 4 weeks to allow the execution creditors to amend their proceedings.

SASKATCHEWAN.

NOVEMBER 20TH, 1909.

FULL COURT.

SAWYER-MASSEY CO. v. BENNETT.

Vendor and Purchaser — Provision that no Assignment by Purchaser be Valid unless Approved by Vendor—Validity —Restraint upon Alienation—Assignment to Plaintiffs without Approval of Vendor—Subsequent Assignment to Another—Fraud—Notice—Equities — Status of Plaintiffs to Maintain Action to Set aside Subsequent Assignment—Evidence—Laches.

Appeal by the plaintiffs from the judgment of WETMORE, C.J., 10 W. L. R. 539, dismissing the action as against the defendants Malcolm J. Macleod and the Canadian Pacific Railway Company.

The appeal was heard by PRENDERGAST, NEWLANDS, JOHNSTONE, and LAMONT, JJ.

Norman MacKenzie, K.C., and J. F. Frame, Regina, for the plaintiffs.

W. B. Willoughby, Moose Jaw, for the defendant Malcolm J. Macleod.

J. A. Allan, Regina, for the defendants the Canadian Pacific Railway Company.

NEWLANDS, J.:—On the 10th May, 1902, the defendant Bennett entered into an agreement of sale with his co-defendants the Canadian Pacific Railway Company to purchase the south-west quarter of 17-19-26 W 2nd. On the 6th May, 1905, the defendant Bennett, being indebted in a large sum to the plaintiff company, executed in their favour a transfer of the said quarter-section. On the 15th June, 1906, the defendant Bennett sold the said quarter-section to the defendant M. J. Macleod, and assigned to him the agreement of sale with the Canadian Pacific Railway Company. The plaintiffs in the action dispute this last-mentioned sale, and ask to have the plaintiff company declared

the owners of the said quarter-section, and a further declaration that the assignment to the defendant Macleod is void against the plaintiff company, and was ineffective to convey any rights to the said Macleod in the said land as against them. The defendant Bennett makes no defence to this action, nor do the defendants the Canadian Pacific Railway Company; they merely recite the facts and submit their rights in the premises to the Court. The real defendant is M. J. Macleod, and his defence is, practically, that he is a purchaser for value of the said premises without notice of the plaintiff company's claim, and that the assignment to him has been approved of by the Canadian Pacific Railway Company, the holders of the legal estate in the said property.

The case was tried before the learned Chief Justice, who gave judgment in favour of the defendant Macleod, on the ground that there was a clause in the agreement of sale between the defendants the Canadian Pacific Railway Company and Bennett which provided that "no assignment of this contract shall be valid unless the same shall be for entire interest of the purchaser and approved and countersigned by the Commissioner of the Land Department or other duly authorised person, and no agreement or conditions or relations between the purchaser and his assignee, or any other person acquiring interest or title from or through the purchaser, shall preclude the company from the right to convey the premises to said purchaser on the surrender of this agreement and the payment of the unpaid portion of the purchase money which may be due hereunder, unless the assignment hereof be approved and countersigned by the said commissioner or other person as aforesaid;" and that under this caluse the company had refused to recognise the transfer to the plaintiff company as a valid assignment; that they had approved of the assignment from Bennett to Macleod; and that, although the approval of this latter assignment had been obtained by the fraud of the agent of the defendant Macleod who obtained such approval, the plaintiff company had no locus standi to attack the transaction; that the fraud was on the Canadian Pacific Railway Company, and they could, if they so desired, attack it, but, as they had not done so, the plaintiff company could not.

I do not think that it is necessary for me to consider the reasons given by the learned Chief Justice for holding

that this clause in the agreement between the Canadian Pacific Railway Company and Bennett is a valid one, but, with all due deference to that learned Judge's opinion, I must differ from him on the interpretation he has put upon this clause. This interpretation is that any assignment by the defendant Bennett of his interest in the land would be void if the company refused to approve of it, and that he considered it similar to the covenant in a lease not to assign or sublet without leave.

Now, a covenant in a lease to assign, if broken, allows the lessor to enter and terminate the lease, and, the lease being determined, the estate of the assignee would also be determined.

In this case no such effect can follow the assignment of the agreement of sale to a person of whom the Canadian Pacific Railway Company will not approve. The estate which Bennett, the purchaser, had in the land before the assignment is not affected, nor is there any provision for its being terminated, but there is a special provision in the clause itself which provides for the effect which will follow an assignment by him without the consent of the company having been obtained—that, upon the completion of the terms of purchase, the company may convey their estate in such land to Bennett, the original purchaser, notwithstanding such assignment. Taking the clause as a whole, its intention seems to be that any assignment to be valid as against the company must be approved by them, and that in the event of an assignment without their approval they may ignore the same and convey their interest in the land to Bennett, their original purchaser, notwithstanding such assignment by him. Once the terms of the agreement of sale are complied with, and the land conveyed by the company to Bennett, the original purchaser, he would hold the same in fee simple without any restrictions, and a transfer or assignment of his estate made by him would take effect. Upon this construction of this clause in the agreement the transfer from the defendant Bennett to the plaintiff company would not be void. It would be good against Bennett and all the world excepting the Canadian Pacific Railway Company. It would not, however, be binding upon them nor prevent them from conveying the land to Bennett, who in that event would become trustee of the said lands for the plaintiff company.

The company refused to approve of this transfer to the plaintiff company, solely because it was in the form of a transfer under the Land Titles Act, which is a form provided by that Act for the transfer of the title to land by a registered owner, and is not a form of conveyance which would convey the legal estate apart from that Act. Now, in this case the legal estate was in the Canadian Pacific Railway Company, and they were registered as owners of this property, and a transfer under the Land Titles Act was not, therefore, a proper form of conveyance for Bennett to use; it would not convey his estate to the plaintiff company at law, but it would in equity give them the right to call upon him to give them a proper assignment of his title to this land, and the plaintiffs therefore had an equitable estate in these lands.

Subsequent to the plaintiff company getting this transfer, the defendant Macleod purchased from the defendant Bennett his interest in the said land, or, as he states in his pleading and evidence, he purchased from one John D. McLeod, who purchased from the defendant Bennett, and procured for the defendant Macleod an assignment of his agreement of sale direct from Bennett. At this time the legal estate was still in the Canadian Pacific Railway Company, as it is to this day, and the estates, therefore, of both the plaintiff company and the defendant Macleod in this land are equitable estates; and up to the time that the Canadian Pacific Railway Company approved of the assignment from Bennett to Macleod the equitable estates of both the plaintiffs and Macleod were in every way similar estates. It is true the plaintiff company did not pay any money to Bennett at the time he transferred this land to them, but at that time he owed them a considerable sum of money, the payment of which was forborne by the plaintiff company on account of such transfer, and therefore the consideration they gave was a valuable one.

Now, if these estates were similar in all other respects, the maxim qui prior est tempore potior est jure would apply, and the transfer to the plaintiff company, being the first in time, would prevail: Rice v. Rice, 2 Drew. 73; Cave v. Cave, 15 Ch. D. 648. It is, therefore, necessary for me to consider whether the fact of the approval by the land commissioner of the railway company of the assignment to the defendant Macleod gives him a better estate than the plaintiff company, and, if it is a better estate, whether it is one that

equity will not interfere with. In Rice v. Rice, Kindersley, V.-C., held that the possession of the title deeds by a subsequent equitable mortgagee gave him a better equity, and there was therefore no room for the application of the maxim qui prior est tempore potior est jure. Now in this case Macleod's assignment has been approved by the Canadian Pacific Railway Company, the holders of the legal estate, which would, I think, all other things being equal, give Macleod a better equitable estate than the plaintiff company. But, to quote Kindersley, V.-C., again in Rice v. Rice, at p. 82: "I must, however, guard against the supposition that I mean to express an opinion that the possession of title deeds will in all cases and under all circumstances give the better equity. The deeds may be in possession of a party in such a manner and under such circumstances as that such possession will confer no advantage whatever. . . . So the deeds may have come into the hands of a subsequent equitable mortgagee by means of an act committed by another person which constituted a breach of an express trust as against the person having the prior equitable interest. In such a case it would be contrary to the principles of a court of equity to allow the subsequent mortgagee to avail himself of the injury which had been thus done to the party having the prior equitable estate or interest. Indeed, it appears to me that in all cases of contest between persons having equitable interests, the conduct of the parties and all the circumstances must be taken into consideration in order to determine which has the better equity."

If we examine the conduct of the parties in this case, especially to find out how the defendant M. J. Macleod obtained the approval of the Canadian Pacific Railway Company to the assignment from Bennett to himself, which would give him the better equity, what do we find? The learned trial Judge has found that the approval to this assignment was obtained in the following manner: "Having procured the assignment to Malcolm J. Macleod, it became necessary to obtain the approval of the railway company, and here fraud and criminal acts were unquestionably perpetrated. But the fraud, in my opinion, was upon the Canadian Pacific Railway Company. The company required, as I have already stated, that an assignment of the character in question should be executed by the assignee, as well as by the original purchaser of the land. Malcolm J. never executed the as-

signment in question. John D., without any authority whatever, put his name to it, and deliberately swore to the execution of the instrument by Malcolm, before a commissioner for taking oaths. So the signature by Malcolm to that instrument was a forgery, and the affidavit of execution was false. I say the signature of Malcolm was a forgery, because it was done with the intent to lead the railway company officials to believe that Malcolm had really signed it, and so to induce them to approve of the assignment to him. For some reason or other, apparently, the railway company required that Bennett's copy of the original contract of sale between them and him should be produced. It was not produced, and John D. McLeod, thinking it necessary that the non-production of it should be accounted for, prepared a solemn declaration purporting to be made by Malcolm J. Macleod setting forth that he was the purchaser of the assignment, and that he had lost the purchaser's copy of the original contract, and that there was no assignment indorsed on such contract, and that he had not delivered it to any person for any purpose whatever. John D. McLeod, without any authority, affixed Malcolm J. Macleod's name to this declaration, and then signed a certificate in his own name as commissioner for oaths that the declaration had been made before him by Malcolm. I hold both these acts to be criminal acts, and therefore fraudulent. John D. McLeod obtained an approval of the assignment of the contract for sale from Bennett to Malcolm J. Had it not been for these fraudulent documents to which I have referred, such approval would not have been granted. There was, to my mind, therefore, a clear fraud with respect to the Canadian Pacific Railway Company. I entirely acquit Malcolm J. Macleod of being an actual party to these fraudulent and criminal acts—he knew nothing about them. Nevertheless John D. McLeod, in endeavouring to procure an approval by the company of this assignment to Malcolm J., was acting as his agent, and Malcolm must take the consequences of his agent's acts."

Now can an approval of the assignment, procured in such a manner, confer any advantage upon Macleod, and is it true that the plaintiff company have no locus standi to avail themselves of such conduct on the part of a subsequent purchaser? As I have already stated, I am of the opinion that the transfer from Bennett to the plaintiff company is not rendered void by the clause in the original agreement of sale

providing for the approval of an assignment by the land commissioner of that company. The plaintiffs, therefore, obtained by that transfer an equitable estate in said land, and when the defendant Macleod bought this land, and had the agreement of sale assigned to him, he got an equitable estate, subject to the plaintiff company's prior equitable estate.

Lord Westbury, L.C., in Phillips v. Phillips, 4 De G. F. & J. at p. 214, says: "I take it to be a clear proposition that every conveyance of an equitable interest is an innocent conveyance; that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to, and no more. If therefore a person seised of an equitable estate (the legal estate being outstanding) makes an assurance by way of mortgage or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, viz., the estate subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and incumbrancers claiming an equity take and are ranked according to the dates of their securities; and the maxim applies, qui prior est tempore potior est jure. The first grantee is "potior"—that is "potentior." He has a better and superior—because a prior—equity. The first grantee has a right to be paid first, and it is quite immaterial whether the subsequent incumbrancers, at the time when they took their securities and paid their money, had notice of the first incumbrance or not."

These remarks of the Lord Chancellor only apply where the equities are in all other respects equal, because, as was pointed out by the Lord Chancellor in that case, and by Kindersley, V.-C., in Rice v. Rice, where a purchaser or incumbrancer who is later or last in time succeeds in obtaining an outstanding legal estate or any other legal advantage, the possession of which may be a protection to himself or an embarrassment to other claimants, he will not be deprived of this advantage by a court of equity. If, therefore, Macleod took subject to the estate of the plaintiff company, they certainly have the right to attack the means he used to get a legal advantage over them by having his assignment approved by the Canadian Pacific Railway Company, and, as these means were found by the trial Judge to be both fraudulent and criminal, and for which Macleod was held responsible, I cannot think that he thereby acquired any better

title than he had before that approval. To hold that a man could better his position in equity by such means would be to put a premium upon fraud, and be against all principles of a court of equity. Without this approval, as I have already said, Macleod's equitable estate is no better than the equitable estate of the plaintiff company, and, all other things being equal, the maxim qui prior est tempore potior est jure applies, and the plaintiff company's estate, being first in time, must prevail.

I have not considered the question of notice, so ably argued by counsel for the plaintiff company, and all I need say in reference to it is that it is an additional reason why the defendant Macleod should not be allowed to take advantage of the approval of his assignment by the Canadian Pacific Railway Company, because at the time this approval was obtained by his agent John D. McLeod, he (the agent) knew of the prior transfer to the plaintiff company, he having himself obtained it, and it is no answer to say that not having used this transfer for a year he supposed it was abandoned by them. The knowledge he had of the transaction was sufficient to put him upon inquiry, when he would have ascertained that the plaintiff company were relying upon the same.

Appeal allowed.

PRENDERGAST and JOHNSTONE, JJ., concurred.

LAMONT, J.—I agree with the judgment of the learned Chief Justice in so far as he holds that the clause in the agreement setting out that no assignment of the contract shall be valid unless approved and countersigned by the defendant company gives to that company, so long as any part of the purchase money remains to be paid, or any of the covenants to be performed by Bennett remain unperformed, the right to refuse to accept any assignment by Bennett at all, or the right to refuse one assignment and accept another. The clause being a valid one, the rights which Bennett acquired in the land were limited by that clause, and whoever acquired Bennett's rights acquired them with the limitation attached thereto.. As against the Canadian Pacific Railway Company, therefore, the action was properly dismissed. This was practically conceded on the argument by counsel for the plaintiffs, but they contended that, even though the railway company approved of the assignment to Malcolm J. Macleod,

they were still at liberty to ask the Court for a declaration that Malcolm J. Macleod was a trustee of the land for them. In this contention I am of opinion that the plaintiffs are right. If the circumstances under which a purchaser of land acquires title be such that some other person is entitled to the beneficial interest in the land, the Court may declare that the purchaser holds that land as a trustee. The question then is: Are the circumstances of this case such that Malcolm Macleod should be declared a trustee for the plaintiffs? The plaintiffs contend that he should be, for two reasons: (1) because they hold an equitable title which is prior in point of time to Macleod's assignment; and (2) because Macleod acquired his title after notice of the plaintiffs' prior equitable right. For Macleod it was contended that he had no notice of the plaintiffs' transfer, and further that by their acts and omissions the plaintiffs have lost whatever priority they had by virtue of their transfer being of an earlier date. The plantiffs' transfer was obtained on the 26th May, 1905. The assignment to the defendant Macleod was executed after the 15th June, 1906. As the railway company held the registered title, the plaintiffs' claim was purely an equitable one. The defendant Macleod obtained the consent of the railway company to his assignment, which gave him a right to call for the legal title, and this gave him a title superior to the plaintiffs. In securing the approval of the railway company to his assignment, John D. McLeod, whom the learned Chief Justice has found was the agent of Malcolm Macleod to secure such approval, was guilty of fraud on the defendant company. Malcolm Macleod cannot, therefore, as has been pointed out by my brother Newlands, take advantage of the fraud to uphold his right to call for a legal estate, and without that approval he has also only an equitable title. The title of both parties, therefore, being purely equitable, the question to be decided is, which has priority.

It is a well known rule that as between equitable claimants, where the equities are in all respects equal, the first in point of time will prevail. In this case, are the equities equal? If so, the plaintiffs are entitled to succeed. The facts upon which the defendant Macleod must rely as giving him a better equity than the plaintiffs are: that the plaintiffs' agents received the transfer from Bennett upon the condition that the plaintiffs would make the payments to the railway company as set out in the contract, with the possible exception of one

payment, about which there is some conflict of testimony; that the plaintiffs' agent had no authority to take the transfer upon that condition; and that, therefore, it was not a binding arrangement until accepted by the plaintiffs; that no notice of acceptance thereof was given; and that no payment or offer of payment was made to the railway company until after Macleod had his assignment. Also the further facts that the plaintiffs, having taken a transfer of the land, left Bennett not only in possession of the land but also in possession of his contract with the railway company, which was the only evidence of title he had to the land, and which John D. McLeod received from Bennett on the 15th June, 1906. Are these facts sufficient to give Bennett a better equity than the plaintiffs?

In Dart on Vendor and Purchaser, 7th ed., p. 858, the learned author says: "Where the contest lies between parties having mere equities, anything which raises a positive equity against the one, upon the principle which in equity, as distinct from law, is designated by the term 'estoppel,' will give the other, though his equity is posterior in creation, a better claim on the assistance of the Court."

In Rice v. Rice, 23 L. J. Ch. 289, it was held that the equitable interests of two parties, the vendor in respect of his lien for unpaid purchase money, and the equitable mortgagee for moneys advanced, being in all respects equal, the equitable mortgagee by the possession of the title deeds had a better equity, and that the rule qui prior est tempore potior est jure can only apply where the equitable interests are in every respect equal. In that case Kindersley, V.-C., said: "In examining into the relative merits of two parties, having adverse equitable interests, the points to which the Court must direct its attention are obviously these: the nature and condition of their respective equitable interests; the circumstances and manner of their acquisition; and the whole conduct of each party with respect thereto."

In Farrand v. Yorkshire Banking Co., 40 Ch. D. 182, the facts resembled those of the present case. There the plaintiffs' testator advanced £200 to one Prince to enable him to purchase a certain property, and took from him a bond for the payment of the money and an agreement that as soon as he had obtained title Prince would execute a legal mortgage and hand over to him the title deeds. Prince purchased the property, but did not give the legal mortgage or deposit the

title deeds with the plaintiffs' testator. About a year afterwards Prince deposited the title deeds with the defendant bank as security for a loan. The bank claimed priority, and the plaintiffs brought action to have ie declared that their claim had priority over that of the bank. In giving judgment Lord Justice North, after pointing out that for about a year after the purchase was made the testator, although entitled to the possession of the title deeds, did not call for them and took no steps to obtain them, but left them in Prince's hands, thus enabling him to borrow on the faith of them from the bank, said: "The question is, under these circumstances, which of the two, the plaintiffs or the bank, ought to be preferred? It is said that they have what are called 'equal equities.' Of course, one equity is always prior to the other in date, and the expression 'equal equities' does not refer to equality in date. When equities are equal in other respects the earlier in date is preferred, but, when equities are not equal, then the priority of date is easily got over, at any rate, as between equitable incumbrancers. Now, if the plaintiffs' testator had asked for the deeds, which under his agreement he was entitled to have, the bank could not have been defrauded by Prince by his depositing the deeds with them, for it is clear that Prince obtained advances from the bank without communicating to them the fact that there was another security on the property. The way in which they were originally induced to lend their money to Prince and to continue dealing with him for 20 years and more, arose simply and solely from the fact that the plaintiffs' testator first, and the plaintiffs after his death, had not chosen to ask for the deeds, or to make any inquiry about them. The testator allowed Prince to receive the deeds on the completion of his purchase, and the testator and the plaintiffs allowed him to retain them for his own purposes, so that he had power to deal with them as he pleased without any claim on their part. It seems to me that in this state of things the equities are not equal, and the plaintiffs are not entitled to set up against the defendants that they are prior to them in point of date."

In Lloyd's Banking Co. v. Jones, 29 Ch. D. 229, Mr. Justice Pearson said: "Where there are equities which are otherwise equal, the possession of the deeds gives priority to the person who has got them."

And in National Provincial Bank of England v. Johnston, 33 Ch. D. 1, Cotton, L.J., says: "As between equitable

claims, the question is whether one party has acted in such a way as to justify him in insisting upon his equity as against the other."

In the present case the conduct of the plaintiffs in not notifying Bennett of their acceptance of the transfer with the conditions on which it was given attached, and their neglect to make the payments to the railway company, led both Bennett and John D. McLeod to the conclusion that the transfer had not been accepted. It seems also to have led Johnston, the head of the Massey-Harris collecting department, and an agent of the plaintiffs, to the same conclusion, for, when John D. McLeod informed him of the sale of the land to Malcolm Macleod, he raised no objection whatever on the ground of the plaintiffs' prior transfer, although he himself had been the one who forwarded that transfer to the plaintiffs' office in Winnipeg. Their conduct also in leaving Bennett in possession of all the title papers to the property enabled him to hold himself out to Macleod as being in possession of all the interest which he obtained under the contract with the railway company. I therefore think that the defendant Macleod has the better equity, unless, indeed, he had notice of the plaintiffs' claim when he purchased the property. Had he such notice? He had no actual notice. But it is said he had constructive notice; that John D. McLeod was his agent in the transaction, and he had knowledge of the plaintiffs' prior transfer. The learned Chief Justice has found as a fact, and I entirely agree with that finding, that John D. McLeod was not an agent for Malcolm Macleod at all until after Malcolm had obtained the assignment from Bennett, but that, having obtained the assignment, he employed John D. McLeod as his agent to secure the approval of the railway company to the assignment. John D. McLeod certainly knew of the plaintiffs' transfer having been taken. Is this sufficient to charge Malcolm Macleod with knowledge of the plaintiffs' claim?

In his Laws of England, vol. 1, at p. 215, Lord Halsbury lays down the law as to notice as follows: "456. Where an agent, in the course of any transaction in which he is employed on his principal's behalf, receives notice or acquires knowledge of any fact material to such transaction, under such circumstances that it is his duty to communicate it to the principal, the principal is precluded, as regards the persons who are parties to such transaction,

from relying upon his own ignorance of such fact, and is taken to have received notice of it from the agent at the time when he should have received it, if the agent had performed his duty with due diligence. But, in the absence of such duty, the principal is not bound by any notice given to, or any knowledge acquired by, the agent, if at the time when the agent received such notice or acquired such knowledge he was not acting as agent on the principal's behalf."

In In re Hampshire Land Co., [1896] 2 Ch. 743, it was held that where one person is an officer of two companies, his personal knowledge is not necessarily the knowledge of both companies. The knowledge which he has acquired as officer of one company will not be imputed to the other company, unless he has some duty imposed upon him to communicate his knowledge to the company sought to be affected, and some duty imposed on him by that company to receive the notice. This principle was approved in Young v. David Payne & Co. Ltd., [1904] 2 Ch. 608.

The case of Kettlewell v. Watson, 21 Ch. D. 685, furnishes a number of valuable illustrations of the principles applicable to notice. In that case Fry, L.J., said: "The first question is, did the principal know of the charge? If he did not, had he an agent who knew of the charge? Then the next question is, was it the agent's duty to communicate that fact to the principal?". And he held in that case that where a sub-purchaser, who had bought a small lot from the purchasers, had allowed the purchasers, at their suggestion, to employ their own solicitors, who knew of the vendor's lien, to prepare the conveyance, there was no duty cast upon the solicitors to communicate to the sub-purchaser the existence of the lien, and the sub-purchaser was not charged with notice thereof, the solicitors' employment being in that case simply to draw the conveyance.

From these authorities it seems to me clear that, before the knowledge of the agent can be imputed to the principal, there must be a duty on the part of the agent cast upon him, by virtue of his employment, to receive and communicate that knowledge to the principal. Applying these principles, the present case seems to me to resolve itself into this: had John D. McLeod, by virtue of his employment to obtain the approval of the railway company, any duty

cast upon him to ascertain and communicate to his principal the fact of there being outstanding equitable claims against the property? In my opinion, there was no such duty. His employment was limited simply to one thing, and that was the obtaining of the approval of the railway company to the assignment. Whatever knowledge he had or obtained, which it was his duty, by virtue of that employment, to ascertain and communicate to Malcolm J. Macleod, is knowledge which can be imputed to the principal, and by which the principal must be bound. But where it was no part of his duty as agent of Malcolm Macleod to ascertain the existence of the plaintiff's claim, I am of opinion that there was no duty cast upon him to communicate to his principal the fact that the claim existed. In no sense was John D. McLeod Malcolm Macleod's general agent in the transaction; therefore the knowledge which he had, and which his employment cast upon him no duty to communicate, cannot be imputed as knowledge to Malcolm Macleod. The defendant Macleod, therefore, having no knowledge of the plaintiffs' claim, and having, as I have held, the better equity, is entitled to succeed.

In my opinion, the appeal should be dismissed with costs.

SASKATCHEWAN.

NOVEMBER 20TH, 1909.

FULL COURT.

ANDERSON v. OLSON.

Contract—Transfer of Agency for Sale of Goods—Agreement to Pay Percentage on Goods Sold by Transferee—Breach of Contract — Conditional Cause of Action — Pleading—Amendment.

Appeal by the defendant from the judgment of McLORG, District Court Judge for the Judicial District of Saskatoon, in favour of the plaintiff in an action for commission on the sale of goods.

B. D. MacDonald, Saskatoon, for the defendant.

John Milden, Saskatoon, for the plaintiff.

The judgment of the Court (WETMORE, C.J., PRENDERGAST, J., LAMONT, J.) was delivered by

WETMORE, C.J.:—The plaintiff's statement of claim is as follows:—

1. The plaintiff is a merchant residing at Saskatoon, and the defendant is a merchant residing at Dundurn.

2. The plaintiff had the agency for the sale of binder twine known as the Plymouth twine, and the plaintiff transferred this agency to the defendant O. T. Olson, and the defendant O. T. Olson agreed to pay to the plaintiff for the transfer of the said agency of the said Plymouth twine half a cent a pound for all twine sold by the defendant during the year 1908, and to be paid on or before the 31st December, 1908, to the plaintiff.

3. The agreement hereunder was made in writing bearing date the 31st October, 1907, signed by both parties.

4. During the year 1908 the defendant sold 35,500 pounds of said binder twine, for which he agreed to pay the plaintiff, under the said agreement, the sum of half a cent a pound.

5. There was also about 3,000 pounds on hand at the time the contract sued on hereunder was made, and the defendant also agreed to pay half a cent a pound on this twine on its sale, but has failed and neglected to do so, although the defendant has sold the same.

6. The plaintiff claims in all:—

1. One half a cent a pound on 35,500 pounds, being $177.50, with interest from the 31st December, 1908, till payment or judgment.

2. One half a cent a pound on 3,000 pounds, being $15, the plaintiff having refused to pay the said amounts or any part thereof.

The plaintiff claims in all the sum of $192.50 and interest from the 31st December, 1908, as aforesaid, and costs.

The defendant, by his plea, admitted paragraphs 1, 2, and 3 of the statement of claim, but denied that he sold 35,500 pounds, or any amount whatever, of such binder twine, or any other binder twine, or that any person sold binder twine on his behalf during the season of 1908, and denied that he had contracted with any person to receive any commission for the sale of binder twine during that season.

He admitted paragraph 5 of the statement of claim, and paid $20 into Court in settlement thereof, on the 1st March, 1909.

In the meanwhile, but before the trial, the defendant had been examined for discovery, and it there appeared that, before the season for selling twine had arrived, the defendant retired from business, and a concern known as "The Home Lumber Company," of which the defendant was manager, secured from the manufacturers the privilege of selling twine, and the defendant sold no twine himself during the season, and there was no evidence to establish that he had sold twine during that season. It may possibly be gathered from the defendant's testimony that he handed over to the company the agency for selling this twine, for which the plaintiff had previously been the agent, and which had been assigned to him, the defendant, and thereby put the company in a position to acquire the agency which it did acquire. I do not consider it necessary, in view of the conclusion I have reached, to express any opinion on that question.

After such examination, I presume, and before the trial, the plaintiff gave notice to amend the statement of claim, by adding thereto three paragraphs to be numbered 5a, 5b, and 5c. What the contents of the proposed paragraph 5b. were does not appear in the appeal book, the learned Judge having refused to allow the amendment as to that clause, but 5a and 5c are as follows:—

5a. The plaintiff says that if the defendant gave up the agency for Plymouth twine in the month of June, 1908, he did so of his own accord, and without notice to the plaintiff, in violation of the provisions of the agreement, express and implied, sued on herein, and therefore committed a breach of agreement and caused damage to the plaintiff.

5c. The plaintiff, in addition to the claim in paragraph 6, claims the sum of $250 for breach of contract by the defendant by reason of the facts set forth herein.

And by the proposed amendment the plaintiff also claimed by way of relief "that the defendant should be made to account to the plaintiff for all Plymouth twine sold by him or by the Home Lumber Company Limited, during the year 1908, and that the defendant be made to account to the plaintiff for all twine sold by the Home Lumber Company Limited in the same manner as if sold by the defendant, and for

which the defendant is liable to pay half a cent a pound on agreement sued on herein."

Application accordingly was made to the trial Judge to allow such amendment, and he allowed paragraphs 5a. and 5c thereof, and I presume also the prayer for relief which I have quoted.

The trial Judge states in his judgment that there was no serious objection raised to this amendment, and therefore he allowed those paragraphs, but goes on to state that in looking into the matter further he was clearly of opinion that he was in error in so doing.

The minutes of trial shew distinctly that the amendment was objected to by the defendant. The objection was serious enough to be noted, and, that being so, I am of opinion that the defendant is entitled to the benefit of his objection, if it was well taken. I am of opinion that the objection was well taken. The proposed amendment lacked any allegation of fact to support it. Looking at the pleading, as it would stand if amended, as allowed by the Judge, and looking at it as a record, it would not be very easy to understand it. In fact, were it not for the examination for discovery of the defendant, it would be utterly incomprehensible. Looking at it from the standpoint of a pleading, it must be of such a character, as amended, as to make a good pleading without having resort to some other document or transaction. How could the plaintiff bring an action based on a contingent allegation—that if a person did so and so he would be liable to damages? I never knew of such a pleading. I could understand a pleading in the alternative, alleging, as a matter of fact, that the defendant, in contravention of the implied agreement set out in the third paragraph of the claim, had committed a breach of such implied agreement, but the way it is alleged here, to my mind, is contrary to the rules of pleading. Consequently, the proposed amendment was bad, and, to say the least, was embarrassing, and I am of opinion that a Judge ought not to allow an embarrassing pleading by way of amendment. If such a pleading had been made in the first instance, and not by amendment, the defendant could have moved to have it struck out as embarrassing, and it most undoubtedly would have been struck out, and I am of opinion that a pleading which would be bad if originally pleaded and which would be struck out as embarrassing, ought not to be allowed at the trial.

Another objection to the amendment is that the learned trial Judge went on and dealt with the case without any defence being pleaded to it. The defence pleaded to the original cause of action clearly is not applicable to the claim as raised by the amendment. I may ask then, what issue did the learned trial Judge try out? If no answer is given to the allegations in a statement of defence, the matter is at issue, but the allegations in the statement of claim are not at issue, because no defence has been entered to them.

The appeal book does not disclose what objections were raised to this proposed amendment at the trial, but the notice of appeal raises the objections that I have mentioned, and I did not understand it to be contended that such notice was, in that respect, improper or irregular.

Although the learned trial Judge held, after consideration, that he was in error in allowing the amendment, he still proceeded to give judgment, holding that the original cause of action was not proved, but that the cause of action set up by the amendment was. I will not follow him in his judgment in that respect, because I consider it unnecessary to do so. The amendment ought not to have been allowed, and, if the amendment ought not to have been allowed, it was not within his province to pronounce judgment upon it.

The cause of action set forth in the 5th paragraph of the defence was admitted by the defence, and the defendant paid into Court $20 in settlement thereof.

The appeal, therefore, should be allowed with costs, the order authorising the amendment and the amendment made thereon, struck out, the judgment of the trial Judge set aside, and judgment entered for the defendant on the issue joined as to the 2nd and 3rd paragraphs of the statement of defence, which were the only issues in the cause; the plaintiff should have the costs of the action down to the time of such payment into Court, and the defendant should have the costs of the action subsequent to that time, including the costs of the trial, and he should also have his costs incidental to the cross-examination of the defendant by the plaintiff; the costs so allowed to the plaintiff and the $20 paid into Court by the defendant should be deducted from the costs so taxed to the defendant, and the defendant should have execution for the balance, and the $20 paid into Court should be paid out to the defendant.

SASKATCHEWAN.

NOVEMBER 20TH, 1909.

FULL COURT.

McCALLUM v. RUSSELL.

Principal and Agent — Agent's Commission on Sale of Land —Agent Finding Purchaser — Acceptance by Vendor — Subsequent Cancellation of Sale — Agreement as to Commission — Evidence — Finding of Trial Judge.

Appeal by the plaintiff from the judgment of RIMMER, DIST. CT.J., sitting as Judge of the Regina District Court, dismissing the action, which was brought to recover commission upon the sale of land.

The appeal was heard by WETMORE, C.J., PRENDERGAST, NEWLANDS, JOHNSTONE, and LAMONT, JJ.

F. W. G. Haultain, K.C., for the plaintiff.

Avery Casey, Regina, for the defendant.

WETMORE, C.J.:—The action was brought to recover $149.75, the balance of $200 alleged to be the agreed commission upon the sale by the plaintiff, who was a land broker, of a lot of land owned by the defendant, situate in Regina.

The property was admittedly listed by the defendant with the plaintiff; whether to find a purchaser or a sale is not material, because the plaintiff not only found a purchaser, but he sold the property to a person whom the defendant accepted.

The terms of the agreement, in so far as they are material to this action, upon which the property was listed, are as follows: "The rate of commission to be $200 paid out of the deposit, viz., city, town, or village property; five per cent. of purchase price, farm lands, per acre, $1." Therefore the commission agreed to be paid was $200.

The terms of sale were: "Price $4,200; cash payment, including the above deposit, $500, or $50 per month." Between the figures "500" and "or $50 per month," the

words "balance as follows" appear in print. These are marked out by a pencil mark going through them.

The plaintiff found a purchaser, one Mary M. Smith, for $4,200. She paid $50 down to the plaintiff on account of the purchase money.

The defendant and Mary M. Smith then entered into an agreement for the sale of this land, dated the 3rd November, 1908. The defendant agreed to sell the property in question to Smith for $4,200; $50 down and $50 on the 1st January, 1909, and $50 on the first day of each and every month thereafter until the whole sum of $4,200 and interest at the rate of 6 per cent. per annum was paid; and receipt of the down payment was acknowledged.

Smith went into possession of the property.

I may say here that the agreement listing the property with the plaintiff is dated the 12th October, 1908, and I have no doubt that the $50 mentioned in the agreement of sale as being received, was the deposit which Mrs. Smith paid the plaintiff on the purchase of the property, and which the plaintiff retained.

The evidence as to what took place between the plaintiff and defendant when the property was listed, and subsequently, is very contradictory. The defendant swore that the property was listed for $4,000, and the plaintiff was to get his commission the best way he could. I presume by that was meant he would get as commission whatever he could sell the land for over the $4,000. Looking at the original agreement listing the property, it would appear that the figures "$4,000" in it may have been changed to $4,200, but the evidence is not sufficient, in my mind, to warrant the Court in holding that this change was made after the defendant signed it. In the first place, the trial Judge does not so find. In the next place, the appearance of the figures in the original document indicate that the change, if any, was made immediately after the $400 was written; the colour of the ink and the general characteristics indicate that. Moreover, $4,200 was the price for which the defendant agreed to sell the property to Smith, and the provision that the commission was to be $200 would not be consistent with the property being listed at $4,000, leaving the plaintiff to get his commission for whatever he might secure over and above the $4,000. There was no evidence that there was

any alteration after signing as to that being the commission stated in the agreement.

The defendant also swore that this document had been altered after he had signed it, by scratching out the word "and" and substituting therefor the word "or." The learned trial Judge has found that the words "balance as follows," which I have referred to, were struck out after the defendant signed this agreement. There was no evidence to warrant that. As before stated, the evidence of the defendant was that the word "and" was struck out and "or" substituted; he swore to no other alteration after signing, and the plaintiff distinctly denies that any change was made in that paper after it was signed. The document does not bear the appearance of having been altered in the way the defendant speaks of.

If the testimony stopped there, I am of opinion that the plaintiff would be entitled to recover his full commission, because he did everything that he was called upon to do under this agreement. He not only found a purchaser, but he brought about a sale on the terms under which the property was listed with him. It is true that he did not secure the $500 deposit, but he did secure the $50 per month, and that was what the agreement warranted. It is true that $500 could not be paid out of the first instalment, $50, but, at the same time, having sold the property in accordance with the terms under which it was listed with him, he would be entitled, in my judgment, to recover the commission agreed to be paid, the defendant having accepted the purchaser. However, before the agreement of sale between Mrs. Smith and the defendant was executed, the defendant objected to signing it, and said to the plaintiff, "What about your commission"? to which the plaintiff replied, "I am not in a hurry for my commission. I will wait until they get a loan or sell it;" and thereupon the defendant signed the agreement. The plaintiff denied all this.

I am of opinion that the defendant having signed under such circumstances, and the Judge having found that he so signed, and there being evidence to warrant that finding, the case is brought within Lindley v. Lacey, 17 C. B. N. S. 578, and if the status quo, as a result of the defendant signing that agreement under such circumstances, had continued, I am inclined to think that the plaintiff would not be entitled to recover the amount of the balance of his com-

mission, until Smith had got a loan or sold the property. But the difficulty I find is that the defendant afterwards cancelled the agreement of sale. Now it seems to me, under such circumstances, that being his own act, he cannot say to McCallum: "It is true you earned your money, but you agreed with me not to press for payment until one of certain events happened, and I have rendered it impossible for either of these events to happen by cancelling the agreement of sale which you brought about, and therefore I am not bound to pay you anything for your services." I am of opinion, therefore, that the defendant, having so cancelled the agreement of sale and put it out of Smith's power to raise the means contemplated for paying the plaintiff, is bound to pay the commission.

And I may just add that I cannot see that the cases cited by the learned trial Judge in his judgment, Taylor v. Caldwell, 3 B. & S. 826, and Kuss v. Hay, [1903] 2 K. B. 740, have any application to this case.

I am of opinion that the appeal should be allowed, the judgment of the trial Judge reversed, judgment entered in the Court of Appeal for the plaintiff for the full amount of his claim with costs, and that the defendant should pay the costs of this appeal.

PRENDERGAST and NEWLANDS, JJ., concurred.

LAMONT, J:—The defendant by an agreement in writing, bearing date the 12th October, 1908, appointed the plaintiff his agent to sell lot 6 in block 411, Regina. The agreement provided that the plaintiff's commission was to be "$200 paid out of the deposit." and the terms of sale were: "Price $4,200. Cash payment, including above deposit, $500, or $50 per month." The plaintiff did not find a purchaser able and willing to purchase the property and make a cash payment of $500, but he did find a purchaser, a Mrs. Smith, who was willing to buy the property at $4,200, and make a cash payment of $50. The plaintiff then prepared an agreement between the defendant and the purchaser providing for a cash payment of $50 and $50 per month thereafter until the full purchase price was paid, and he received $50 from the purchaser. He then took the agreement to the vendor for execution. After several weeks' delay the vendor signed the agreement. The purchaser remained in possession of the property for only one month, and did not make any further payments, and the agreement was subsequently cancelled.

The plaintiff retained the $50 paid, and sued the defendant for the balance of the $200 commission, less a 25 cent item which he credited to the defendant. In the alternative he sued for $149.75 on a quantum meruit. The matter was heard before the Judge of the District Court, who held that the plaintiff was not entitled to recover under either the agreement or on a quantum meruit. From this judgment the plaintiff appeals to this Court.

In his notice of appeal the plaintiff does not claim to be entitled to commission under the agreement, but does contend that he is entitled to recover on a quantum meruit for services rendered because he found a purchaser who agreed to purchase on terms which the defendant agreed to accept. The defendant admits that he executed the agreement with the purchaser, but he asserts that he refused to do so until the plaintiff agreed to wait for his commission until the purchaser could get a loan through or sell the property. The learned trial Judge found the facts to be in accordance with the defendant's statement, and a perusal of the evidence satisfies me that this finding is correct. The trial Judge also found as a fact that "Smith only paid $50, and at the end of the month abandoned the property." And this finding is not appealed against nor questioned. We have not a verbatim report of the evidence given at the trial, but only the notes taken by the Judge, but where there is an important finding of fact, and that finding is not questioned by either of the parties to the appeal, I think we may take it to have been duly proven, although the Judge's notes do not shew the evidence that led up to that conclusion. On the argument counsel for the plaintiff took no exception to this finding, although the defendant set it up as a finding of fact in his factum.

In February the defendant cancelled the agreement, having received no money whatever on account of the sale. The defendant having cancelled the contract, it is argued that he thereby made the obtaining of a loan or payment by Smith impossible, and therefore the plaintiff is now entitled to recover the full commission. I cannot think this contention well-founded. If effect were to be given to it, what position would the defendant be in? His agreement with the plaintiff, as I find, was this, that he would pay the balance of the commission when Smith obtained a loan or sold the property; in other words, he would pay the plaintiff as soon as he re-

ceived the amount from Smith. Smith at the end of the month abandoned the property without making any further payment. In these circumstances, what was the defendant to do? If the contention of the plaintiff is right, he would cancel the contract without rendering himself liable to pay at once the balance of the commission. If he does not cancel the contract, the plaintiff certainly is not entitled to the commission, but the defendant cannot deal with the property, as the contract with Smith is still subsisting. So that the defendant would have neither the purchase money nor the use of the property. Must he then bring an action against Smith for the balance of the purchase money in order to demonstrate that the contract is not an enforceable one, before he can be relieved of his obligation to pay the commission? Under the circumstances of this case, I do not think so. The defendant was under obligation to pay the commission when he received it from Smith and not before. Then he cancelled the contract. This, it is said, put it out of the power of Smith to carry out the agreement. But we have no evidence that Smith ever intended to carry out the agreement, and we have the distinct finding of fact that Smith had, previous to the cancellation, abandoned the property. Can we therefore say that, but for the cancellation of the contract by the defendant, Smith would have paid the purchase money, and the plaintiff have thus become entitled to his commission? Yet, it seems to me, that is what we must hold to give effect to the plaintiff's contention. Before he is entitled to recover, the plaintiff must shew that the defendant received the money from Smith, or that, but for his own act or neglect, he would have received it. The defendant did not receive the money, and, with very great deference, it does not seem to me that we should hold that he would have received it but for the fact of his having cancelled the agreement, in the face of the fact that Smith had previously abandoned the property. Where, as in this case, the purchaser had previously abandoned the property, I think the onus was upon the plaintiff to shew that the condition upon which he was to receive his commission would have been fulfilled but for the defendant's act.

The appeal should, in my opinion, be dismissed with costs.

JOHNSTONE, J., concurred with LAMONT, J.

Appeal allowed; JOHNSTONE and LAMONT, JJ., dissenting.

SASKATCHEWAN.

NOVEMBER 20TH, 1909.

FULL COURT.

CROSS v. DOUGLAS.

Vendor and Purchaser — Contract for Sale of Land — Covenant by Vendor to Prepare Land for Cultivation and Leave Hay on Land — Misrepresentations by Vendor — Amendment — Collateral Verbal Contract — Reformation of Contract and Rescission — Damages — Counterclaim — Interest.

Appeal by the defendant and cross-appeal by the plaintiffs from the judgment of PRENDERGAST, J., 10 W. L. R. 163.

The appeal was heard by WETMORE, C.J., NEWLANDS, JOHNSTONE, and LAMONT, JJ.

W. B. Willoughby, Moose Jaw, for the defendant.

G. E. Talbot, Moose Jaw, for the plaintiffs.

NEWLANDS, J.:—This is an action for an instalment due under an agreement for the sale of land. The defence is that the plaintiffs entered into a parol contract with the defendant that they would break or have broken 200 acres of said land in the year 1906, but that they only broke 136 acres, and by reason of such default the defendant lost the crop off 64 acres. There is no finding upon this defence, but the learned trial Judge says: "With reference to the statement made by the plaintiffs that there were 200 acres broken, I do not think that the defendant is entitled to damages on that ground, for, although the statement was a misrepresentation, there being in fact only 136 acres broken, still it was made in good faith, and there was no fraud or deceit."

I cannot agree with this finding as either founded on the pleadings or supported by the evidence. Paragraph 5 of the defence says that the plaintiffs, by a parol agreement prior to and not included in the written agreement, agreed to break or have broken 200 acres, and in paragraph 7 it is

stated that the plaintiffs represented to the defendant that there were then broken or that they would have broken 200 acres of the said lands for the defendant. The evidence is also to the same effect. The defendant swears that he pointed out to the plaintiff Cross that there were not 200 acres broken, and that Cross promised to have the same broken, but nowhere is there any evidence that defendant entered into the agreement upon the faith of a representation that 200 acres were then broken. The learned trial Judge was, in my opinion, wrong in holding that there was a misrepresentation, though an innocent one, that 200 acres were broken, and in not holding that the plaintiffs had agreed to break 200 acres as set out in the statement of defence.

The above finding of the learned trial Judge is not appealed against, but, notwithstanding that fact, I think this Court should give such judgment as the defendant is entitled to from his pleadings and the facts proved at the trial. In Attorney-General v. Simpson, [1901] 2 Ch. 671, Vaughan Williams, L.J., said (p. 713): "I think that under Order LVIII., rule 4, we can make the proper declaration, notwithstanding that there is no appeal by the plaintiffs against so much of the judgment as declares that the defendant is not bound to repair and maintain the works." And Stirling, L.J., at p. 720, said that he thought the Court should exercise the power conferred by that Rule and give the judgment the case required, although that part of the decision was not complained of. Order LVIII., rule 4, is the same as our Rule 507, which gives the Court power to draw inferences of fact and to give any judgment and make any order which ought to have been made and to make such further or other order as the case may require; and such powers may be exercised by the Court, notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, and may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision.

The defendant also counterclaims against the plaintiffs for damages because the plaintiffs did not in a good and husbandlike manner disc and perform all other requisite things to prepare the portion of the lands under cultivation for the crops of 1907, and did not keep down the weeds as provided in said agreement of sale; also, because the plaintiffs did not

leave 25 tons of hay on said lands as provided in said agreement. The learned trial Judge found for the defendant on these two items of his counterclaim and gave him damages therefor, from which finding the plaintiffs have not appealed.

The defendant also counterclaims for the loss of crop on the 64 acres not broken according to verbal agreement. Upon this issue the learned trial Judge held that the damages were too remote. I agree with this finding. In Corbin v. Thompson, 39 S. C. R. 575, at p. 580, Davies, J., says: "Nor am I able to follow Russell, J., in allowing these damages as anticipated profits. Such profits are only recoverable when they can be held to be what are called primary profits, such as would have occurred and grown out of the contract itself as the direct and immediate result of its fulfilment. Then they are part and parcel of the contract itself and must have been in contemplation of the parties when the agreement was entered into. But if they are such as would have been realised from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as part of the damages occasioned by the breach of the contract in suit, unless indeed the defaulting contractor has expressly contracted to be bound for such consequences, or the special circumstances are such that he may be held to have impliedly contracted to be so bound."

Now, the profits which the defendant would have derived from sowing grain upon these 64 acres, if they had been broken, are anticipated profits, and not primary profits such as would have occurred and grown out of the contract itself, as a direct and immediate result of its fulfilment. The only direct and immediate result of the breaking of the land would be the increased value of the land on account of such breaking. The defendant would have had to have done something else before he could get a crop of grain. He would have had to sow the land, and then the crop would have depended upon the kind of grain he sowed and the many other contingencies upon which the success of a crop rests. The results of planting a crop on this land are far too uncertain to allow damages therefor, and they are therefore too remote.

As I have said, the direct and immediate result of the fulfilment of the agreement would be the increased value

of the land. That increase would be the cost of the labour in breaking it. I think the defendant has proved that there was such a verbal agreement collateral to the written contract. The defendant and one witness, Luke J. Weatherson, swear that plaintiff Cross made such an agreement, and Cross himself practically admits it when he swears that he was prepared to allow defendant the cost of breaking this 64 acres but would not allow him for any profits. The fact that this agreement was not in writing nor included in the agreement of sale is no reason why the defendant should fail upon this issue, which is clearly raised in his defence, the facts being set out there as I have stated them. It does not contradict the written agreement, but is in addition to and collateral to it, and, as it was a promise made by the plaintiff Cross upon the faith of which the defendant entered into the agreement of sale, the plaintiffs should not be given specific performance of the written agreement without their performing this verbal contract, which was entered into by Cross as an inducement for the defendant to purchase the land: Pember v. Mathers, 1 Bro. C. C. 52. He is therefore entitled to set up the damage he has suffered by the non-fulfilment of this verbal agreement as a defence to the plaintiffs' action for the instalment of purchase money claimed. It was proved that this work would cost $4 per acre, a total of $256, and the learned trial Judge's judgment should be amended by crediting the defendant and reducing the judgment by that amount.

The defendant has also appealed against the learned trial Judge's judgment in refusing the amendment asked for by him at the trial. This amendment was to the statement of defence, and was to the effect that plaintiffs represented that there were 200 acres broken on this land, and that he was induced to enter into the agreement to purchase by said representation, and claiming damages for the 64 acres unbroken. This amendment was properly refused, because it does not contain an allegation of knowledge on the part of the plaintiffs that the alleged representations made by the plaintiffs were untrue: Redgrave v. Hurd, 20 Ch. D. 1, at p. 12; and the proposed defence would be neither a defence to the action nor a ground for a counterclaim. The defendant also asked to have the written agreement rectified to carry out the real agreement between the parties. This was also properly refused, there being no necessity to rectify the writ-

ten agreement, as the real agreement can be carried out without such rectification.

The plaintiffs also cross-appeal against the learned trial Judge's judgment because he did not allow the plaintiffs interest on the instalment. The agreement was on a printed form, which contains a clause "together with interest from the date hereof at the rate of per cent." This blank was filled in with a dotted line, shewing that no interest was to be charged before the due date, but instalments overdue are to bear interest. No rate being mentioned in the agreement, interest should be allowed at the legal rate.

The appeal should be allowed by reducing the judgment by the sum of $256.

JOHNSTONE and LAMONT, JJ., concurred.

WETMORE, C.J.:—This was an action to recover $891.50 under agreement for the sale of land by the plaintiffs to the defendant. The formal agreement, if I may so call it, was reduced to writing. Prior to the agreement being prepared and signed, the defendant and the plaintiff Cross met, and the defendant testified that Cross told him that 200 acres of this land had been broken; that he had contracted with one Madigan to do it; and, if it was not done, he would see that it was done. Cross denied this, and he testified, in a general way, that, on Douglas representing to him that there was not 200 acres broken, he told him he did not know how much was broken: that Madigan was supposed to break 200 acres. The defendant counterclaimed, among other things, for damages for not breaking a portion of this 200 acres, amounting to 64 acres.

The learned Judge in his judgment, after setting out other matters, states: "The defence is to the effect that the plaintiffs represented to the defendant that there was then broken or that they would have broken 200 acres of the said lands, whereas there was only 136." And then further on he proceeds: "With reference to the statement made by the plaintiffs that there was 200 acres broken, I do not think that the defendant is entitled to damages on that ground, for, although the statement was a misrepresentation, there being in fact only 136 acres broken, still it was made in good faith, and there was no fraud or deceit."

Assuming that there was no binding agreement between the parties that this breaking was or should be done, or was done, I think the learned Judge was warranted by the evidence and the law in reaching that conclusion, and we must assume that the learned Judge found that there was no binding agreement.

Apparently he has made no express finding upon the question whether Cross stated to the effect that if 200 acres were not broken he would see that it was done. After the interview between Cross and the defendant, a formal agreement, as I have before stated, was prepared and signed by the parties, and that agreement, among other things, contained the following clause: "The vendors agree properly and in a good and husbandlike manner to disc and perform all other requisite things to prepare the portion of the said lands at present under cultivation for the crop of 1907, and will also keep down weeds."

There were not 200 acres of this land broken. The breaking lacked 64 acres of that quantity.

I cannot bring my mind to the conclusion that what took place between Cross and the defendant as to the breaking, constituted a parol agreement collateral to the formal written agreement, or that any agreement at all, outside such formal agreement, was made. The rule of law still holds good that a written agreement cannot be altered or varied by parol testimony or by parol agreement, but a collateral parol agreement may, under some circumstances, be made to the written agreement, provided that such collateral agreement is not inconsistent with the written one.

The question that arises in such cases is—what was the intention of the parties? Was it the intention that the written agreement should contain the whole arrangement, or not? Was there an agreement, outside the written agreement, to which it was intended effect should be given, provided, of course, it is not inconsistent with the written agreement as before stated. It is purely a question of intention, and is therefore a question of fact. I cannot just quite convince myself, the learned Judge having only found with respect to what Cross said as to the 200 acres being broken and going no further, whether he intended to hold that Cross did not promise if 200 acres were not broken, he would see that they were. I am of opinion that, the learned Judge having left it the way he did, it is open to this Court to find

with respect to that fact as the evidence warrants. I am satisfied that, if all Cross said was that 200 acres were broken, that would have been merely a misrepresentation, or, at least, it was open to the learned Judge to so find. If, however, Cross made the promise that, if they were not broken, he would see that they were, that might raise a different question. I will not express any opinion with respect to it, because I am not satisfied, under the evidence, that it was the intention of the parties that what took place between them should form a collateral agreement. The onus of establishing that is on the defendant. It is a very common saying that it takes two at least to make a bargain, and it is also necessary that there must be a promise on the one side, supported by a consideration moving him on the other. I do not find the consideration for the alleged promise on Cross's part so clearly expressed as I would have expected to find it if a parol collateral agreement was intended.

After the conversation in question was had between the parties, the written agreement to which I have referred was drawn up, and the clause inserted with respect to discing and preparing the cultivated portion of the property. Now that was work of a character very similar to the breaking. If it was the intention of the parties that the plaintiffs should see that the breaking was done, and it was to form part of the agreement between them, I cannot see why the promise with respect to the discing was put in the agreement, and that with respect to the breaking left out. And in this connection it is important, I think, that there was no direct evidence that the defendant entered into the agreement on the faith of the promise alleged to have been so made by Cross.

I will now draw attention to some of the authorities bearing on the question. I am of opinion that they tend to bear out my holding, and they are, all but one, the most recent decisions on the subject.

Pember v. Mathers, 1 Bro. C. C. 52, approaches nearer in support of the defendant's contention than any other case I can find. There leasehold property was sold at auction by the lessee, the plaintiff. The defendant, the assignee of the lease, had given a parol undertaking to indemnify the assignor, the original lessee, against all rents or covenants to be paid or kept on his part toward the original lessor, and to execute a bond for securing such indemnity. No mention

of this undertaking was set out in the assignment of the lease. The assignment was, on its face, subject to the rents and covenants on the part of the lessee. The auctioneer corroborated the testimony of the plaintiff with respect to a parol agreement to indemnify, given by the defendant. The action was for specific performance, and the relief prayed for was granted. Lord Thurlow, in delivering judgment, stated as follows: "Here, the estate was to be sold out and out by auction; the vendor would expect to have no more connection with the original lessor. The terms imply that the assignee should stand in the place of the original lessee. Suppose there had been no assignment, but the money ready to be paid, and the instrument tendered without such covenants, and referred to the Master, the Master, or the Court upon exceptions, would have thought the covenant to indemnify ought to be included. Here is a witness to swear it was so agreed. The first objection made is that the evidence is inadmissible, upon the ground that, where the parties have entered into a written agreement, no parol evidence can be admitted to increase or diminish such agreement. The rule is right; but, where the objection was originally made, and promised by the other party to be rectified, it comes among the string of cases in 1 Eq. Abr. 230, 231, where it is considered as a fraud upon the rule of law."

The learned Judge there recognised the rule with respect to the inadmissibility of parol evidence to increase or diminish a written agreement, and, it seems to me, that this case was decided under the peculiar circumstances of it, and upon the lessee insisting upon the assignee's express undertaking to do something that ought to have been provided for in the assignment.

The next case, in point of time, is Harris v. Rickett, 28 L. J. Ex. 197. In that case a bankrupt, before his bankruptcy, had borrowed money from the defendant Rickett, and had given him a promissory note, and to secure such promissory note he agreed, by memorandum in writing, whenever he was requested so to do, to execute a mortgage of his estate and moneys expectant on the decease of his wife's father, and to assign and transfer a policy of insurance, by way of security for the loan, and he further agreed, by a memorandum in writing, to allow Rickett, in addition to the interest he had secured, a yearly bonus of £10. These securities were given on the 17th February, and on the 13th

of the following April Rickett requested him to give him a bill of sale on his furniture, which he did, Rickett stating that he was not comfortable about his money. This bill was duly registered, and the bankrupt's assignees brought the action for conversion. It was established in evidence, to the satisfaction of the jury, that when the money was advanced the bankrupt promised to give the bill of sale when requested. There the promise to give the bill of sale was given on the express consideration of the advance of the loan as a security; and the bill of sale was actually given upon such request; and, moreover, it was only in addition to the securities mentioned in the memorandum in writing. In delivering the judgment, Pollock, C.B., at p. 200, lays down the following: "That we are of opinion that the rule should be discharged, on the ground that the writing does not contain and was not intended to contain the entire obligation of the bankrupt."

The next case is Lindley v. Lacey, 17 C. B. N. S. 578. The defendant in that case, who had formerly occupied a coffee-house, had let the same to the plaintiff, and sold him the furniture, fittings, and utensils therein. The plaintiff, having exhausted his capital in the purchase of the business, and becoming embarrassed, was being sued by one Chase, to whom he had given an acceptance for £25; he applied to the defendant for assistance, and the defendant thereupon promised, if he would abstain from calling his creditors together (as he contemplated doing), and would induce the landlord of the premises to forbear to distrain for payment of the rent then due, he, the defendant, would settle Chase's action. Some further negotiations took place between the parties, and ultimately the defendant proposed to re-purchase the furniture and fittings and re-take the premises, and an agreement in writing was drawn up. In that agreement there was no clause binding the defendant to settle the Chase action, but, before the plaintiff signed the memorandum, he said to the defendant, "Am I to understand that Chase's bill is to be settled, because that is the ground work of the whole?" To this the defendant replied, "Yes; I will see it settled." He did not settle the action, and the plaintiff brought the action in question. There it was held, and rightly held I think, that the agreement was collateral to the agreement to which I have referred. In fact, it was entirely outside it. It was the inducement under

which the plaintiff signed the written agreement. Erle, C.J., at p. 585, laid it down as follows: "If the instrument shews that it was meant to contain the whole bargain between the parties, no extrinsic evidence can be admitted to introduce a term which does not appear there. But, if it be clear that the written instrument does not contain the whole, and the jury find that there was a distinct collateral verbal agreement between the parties, not inconsistent with the written contract, the law does not prohibit such distinct collateral agreement from being enforced."

In Morgan v. Griffith, L. R. 6 Ex. 71, the plaintiff hired some grass land to the defendant, who entered on the land and found it overrun with rabbits. The lease was presented to him for signature, and he refused to sign it if he was to be annoyed by the rabbits in the future. He again complained when paying his rent in the following March of the annoyance, and the defendant promised to destroy the rabbits. After that the lease was again tendered to the plaintiff for signature, and he again complained of the number of rabbits and refused to sign it, or continue to hold the land for the current year. The defendant then said, "I promise you faithfully that they shall be destroyed," and the plaintiff requested that a term to that effect should be inserted in the lease. This the defendant refused. He again promised that the rabbits should be destroyed, and the plaintiff accordingly signed the lease. It was held there that this was a collateral parol agreement and was binding; and the consideration for it is clear, viz., he was induced to sign the lease by the express promise of the defendant that the rabbits should be removed.

In this case, as I have stated before, there is no express consideration for the promise to break the land, to support a parol agreement collateral to the writing. The intention is not as clear as it should be to bring this case under the authorities which I have considered, and I feel that we ought not to allow the door to be opened for any loosely expressed langauge to be interpreted as proving a collateral agreement, when the parties have reduced their agreement to writing. It would, I think, be opening a wide door for perjury. The temptation would be very great to set up something entirely outside of the agreement, and never in the contemplation of the parties, with a view of escaping the consequence of some default, or some obligation. I cannot bring my mind

to the conclusion that, where parties enter into a written agreement whereby one party promises, by a certain specific agreement, to do this and to do that and to do the other, an alleged verbal agreement by one person to do something else not specified in the agreement, for the same consideration, is not an addition to or a variance from the written agreement. If it is otherwise, the rule that a written agreement cannot be altered or varied by a parol agreement serves no purpose.

As to the refusal of the learned Judge to allow the amendment at the trial, that ground of appeal was not pressed at the argument.

I agree with my brother Newlands that the damages for the loss of crop and profits by reason of the ground not being properly disced and prepared, are too remote.

I therefore think that the defendant's appeal should be dismissed with costs.

I am further of opinion that the defendant's cross-appeal should be allowed. The agreement for sale is, for the most part, made on a printed form. After stating the price and time of payment and a clause which is typewritten in,—that the purchasers agree to assume the amount due to one Benjamin Smith under an agreement of sale, the agreement goes on, after providing for the payment of these moneys, as follows: "Together with interest from the date hereof at the rate of per cent. per annum, on so much of the said purchase price as remains unpaid from time to time and payable on the day of in each and every year thereafter until said purchase price is paid, and interest and principal unpaid when due shall bear interest at the rate aforesaid from the date when it becomes due. . . . The above instalments of purchase money and interest are payable at Moose Jaw aforesaid to the vendors."

All that I have just quoted is printed matter, excepting the words "Moose Jaw aforesaid to the vendors;" that is typewritten. It is contended that, because the rate of interest was left blank, it was an indication that no interest was to be paid at all. I cannot bring my mind to that conclusion. We find, in a subsequent part of the agreement, an acceleration clause providing "that on any default in the payment of any instalment of either principal or interest or taxes the whole of the principal or interest hereby secured shall at once become due," and further on the following clause:

"That the vendee attorns to the vendor at a yearly tenancy equal to the amount of the yearly payment of interest due upon the purchase money hereof." And then another subsequent clause provides: "That the vendors may pay the liens and taxes upon the land and insurance premiums, and that those moneys so paid shall be a charge upon the land and shall be re-payable by the purchaser with interest at the rate aforesaid until paid."

Surely these clauses cannot be ignored or read as meaning nothing so far as interest is concerned.

It seems to me that persons signing an agreement of this sort, carelessly it may be, cannot be allowed to set up that because the matter is printed matter and is not filled in, it is of no effect, provided that sense may be drawn out of what is left. In my opinion, the true construction to be put upon the instrument is that, the rate of interest not being fixed, interest is payable at the legal rate of 5 per cent., just as if the agreement had provided that the money was payable with interest, without stating what the interest was.

Section 3 of the Interest Act, R. S. C., 1906 ch. 120, provides, except as to certain liabilities mentioned, in which this is not included; "Whenever any interest is payable by the agreement of parties or by law, and no rate is fixed by such agreement or by law, the rate of interest shall be 5 per centum per annum;" and I am of opinion that this exactly applies.

My opinion, therefore, is that the cross-appeal should be allowed with costs, and interest at the rate of 5 per cent. added to the sum awarded by the learned trial Judge, from the date of the agreement.

ERRATUM.

In vol. 11 of the Western Law Reporter, p. 86, 20th line from top: for "irregular" read "regular."

THE

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SASKATCHEWAN.

NOVEMBER 20TH, 1909.

FULL COURT.

KASINDORF BROTHERS v. HUDSON BAY INSURANCE CO.

Parties—Action in Name of Foreign Partnership as Plaintiffs—Rule 37—Irregularity — Waiver by Appearance—Substitution by Order of Names of Partners—Practice.

Appeal by the defendants from an order of NEWLANDS, J., in Chambers, dismissing an appeal from an order of the local Master at Moose Jaw allowing the plaintiffs to amend the writ of summons and statement of claim by inserting the names of the individual partners making up the firm of Kasindorf Brothers, as plaintiffs, the action having been brought in the name of the firm, which carried on business in New York.

J. F. Hare, Moose Jaw, for the defendants.

W. B. Willoughby, Moose Jaw, for the plaintiffs.

The judgment of the Court (WETMORE, C.J., PRENDERGAST, JOHNSTONE, and LAMONT, JJ.), was delivered by

JOHNSTONE, J.:—The plaintiffs reside and carry on business in New York city as Kasindorf Brothers. The defendant company has its head office at Moose Jaw.

The plaintiffs, who were and are foreigners, on the 7th October, 1908, issued a writ in the firm's name against the defendants for the recovery, under a contract of insurance

with the defendants, of $541, alleged loss sustained by fire to goods in New York city.

The defendants entered an appearance to the action, through their solicitor, on the 26th October, and, as the result of an application made for that purpose in November following, on the 11th December obtained an order for security for costs with a stay of proceedings.

On the 12th February last the required security, $200, was deposited in Court to the credit of the cause.

The defendants on the 22nd of the same month obtained a summons from the local Master at Moose Jaw calling upon the plaintiffs to shew cause why the writ of summons and the statement of claim should not be set aside.

On the 24th April, 1909, this summons was by the local Master dismissed with costs.

The defendants, under Judicature Rule 37, on the 15th April, demanded from the plaintiffs in writing particulars as to the names, addresses, etc., of the plaintiffs. This demand was satisfied finally on the 22nd April, 1909.

The defendants on the 26th of the same month, for what reason does not appear, obtained a second summons to set aside the writ and statement of claim, on the ground that the issue of the writ was irregular and not warranted by the procedure under our Rule 37, the plaintiffs' firm never having carried on business in the province.

On the return of this summons, the local Master made an order giving leave to the plaintiffs to amend their writ and statement of claim by inserting the names of the individual partners comprising the firm.

From this order the defendants appealed to a Judge in Chambers, and the matter came before my learned brother Newlands, who dismissed the appeal.

From this judgment the defendants further appealed to the Court en banc, on several grounds, as follows:—

2. That the writ of summons and statement of claim herein were issued without the warrant of any Rule or enactment and are null and void.

3. That the plaintiffs' firm, not being a firm or partnership carrying on business within the jurisdiction, cannot sue in the firm name.

4. That the plaintiffs are unknown to this jurisdiction.

5. That the plaintiffs did not satisfy the local registrar before the issue of the writ of summons that the plaintiffs carried on business within the jurisdiction.

6. That the writ of summons and statement of claim having been issued without the warrant of any Rule or enactment, and being null and void, cannot be amended.

I agree with the reasons for judgment of my learned brother who heard the appeal.

The question arising in the case cited by counsel for the appellants, Smurthwaite v. Hannay, [1894] A. C. 501, was a different question altogether and one under a different Rule, English Order XVI., r. 1. In that case it was a question of misjoinder of plaintiffs, and it was admitted that the claims of the plaintiffs were several, that they had no joint cause of action or claim to relief, and that before the Judicature Act they could not have been joined as plaintiffs in such an action. It was contended that Order XVI., r. 1. justified the course which had been pursued in making them co-plaintiffs, but the Court held otherwise, and that the Rule did not warrant such course. Lord Herschell, in giving judgment, said: "I cannot accede to the argument urged by the respondents, that even if the joinder of the plaintiffs in one action was not warranted by the Rule relied on, this was a mere irregularity of which the appellants, by virtue of Order LXX., could not now take advantage. If unwarranted by any enactment or Rule it is, in my opinion, much more than an irregularity." Lord Russell of Killowen used similar language at p. 506.

I can very well understand how the joining of several plaintiffs in the same action having different and several causes of action could not be treated as an irregularity. Such joinder of plaintiffs, as stated by Lord Russell, was the constitution of a suit as to parties in a way not authorised by the law and the Rules applicable to procedure, and in a way that was not capable of being remedied by Order LXX., our Rule 538. The proceedings could not be carried on, nor could a trial take place, with all the parties of different interests and claims before the Court. Some plaintiffs with divergent interests would have to be struck off the record. Moreover, Order LXX. could have no application to such a state of affairs. It was never so intended.

The question in the case at bar arises under Rule 37: "Any two or more persons claiming or being liable as co-

partners, and carrying on business within the jurisdiction, may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action; and any party to an action may in such case apply by summons to a Judge for a statement of the names and addresses of the persons who were at the time of the accruing of the cause of action co-partners in any such firm, to be furnished in such manner and verified on oath or otherwise as the Judge may direct. (2) Any person carrying on business in the name of a firm apparently consisting of more than one person may be sued in the name of such firm."

This Rule corresponds to Eng. Order XLVIII. a, r. 1, which now takes the place of Rules 6 and 7 of Order IX., the difference consisting in the use in our Rule 37 and Order XLVIII., r. 1, in the English, of the words "carrying on business within the jurisdiction."

Most of the cases cited turned upon the question of jurisdiction in the Courts to deal with foreigners. In Russell v. Cambefort, 23 Q. B. D. 526, it was held that a foreign partnership, the members of which were foreigners resident out of the jurisdiction, but carrying on business in England, could not be served under Rule 6 of Order IX. by service on the manager at the principal place of business within the jurisdiction—that such Rule did not apply to foreigners not resident in England, though carrying on business there. It was further held that, though an Act of Parliament can give jurisdiction to the Court against British subjects, as to foreigners Parliament has not and does not assume to have jursdiction against those residing abroad and who have not submitted to the jurisdiction of the English Courts.

Lopes, L.J., said in delivering judgment: "I think the Rule does not give jurisdiction as against foreigners. . . . I think the rule only applies to English subjects." All that was done in this case was to set aside service on the manager.

Western National Bank of New York v. Perez Triana Co., [1891] 1 Q. B. 304, is another case where the question of jurisdiction was raised, a question not material in the case under discussion, because the plaintiffs have submitted to the jurisdiction. The defendants have appeared and taken steps in the action. In the latter case a writ was issued against a foreign partnership firm in the firm's name, which firm carried on business abroad with no place of busi-

ness in England. The writ was served on a person, an alleged partner, temporarily in England. This partner entered a conditional appearance, after which he entered an unconditional appearance, and in his own name applied to set aside the service of the writ. A Divisional Court refused to set aside the service. Held, by Lord Esher, M.R., that the service was good service on the firm. By Lindley and Bowen, L.JJ., on the authority of Russell v. Cambefort, that Rule 6 of Order IX. did not apply to the case of a foreign firm, but that the defendant-appellant had, by appearing, waived the irregularity, and it was ordered that if the plaintiffs would elect to amend the writ by naming the appellant, the service would stand as against him. The Master of the Rolls said: "If the person attempted to be served desires to submit that there was no proper service, he must move to set aside the alleged service, but he must do so before he appears, because, if he appears, any irregularity in the service is waived by his appearance." At p. 317 of the report, Lord Justice Bowen says: "But the defendant is really himself sued together with others, since the plaintiff intends to include him, and to shew at the trial that he is properly included, among the members of the firm, and the irregularity of the nomenclature in the writ the defendant has waived as against himself by appearance, since he might if he had chosen have moved, under Order XII., Rule 30, to set aside the service upon himself, and was not obliged to appear to enable him to move." The same doctrine is laid down in Dobson v. Festi Raisini and Co., [1891] 2 Q. B. 92, at pp. 94, 95.

Heinemann v. Hale, [1891] 2 Q. B. 83, a case decided since the alteration in the Rules relied upon by the appellants, the Hudson Bay Insurance Co., as in their favour, I read as approving of the decisions in Russell v. Cambefort and the Western National Bank case. In Heinemann v. Hale a writ was issued against a foreign firm in respect of a breach of contract made and to be performed in England. The writ was issued in the firm name, and was served on one of the three partners who was resident in England, the other two residing out of England. On an application of the partner resident in England, before appearance, to set aside the writ and service, the decision of the Queen's Bench Division was reversed and the writ set aside. Fry, L.J., in concluding his judgment, says: "In coming to the conclusion I have

expressed. I am fortified by both the cases of Russell v. Cambefort and Western National Bank of New York v. Perez Triana and Co."

I think, therefore, the defendants having appeared as they did, the appeal should be dismissed with costs.

SASKATCHEWAN.

NOVEMBER 20TH, 1909.

FULL COURT.

REX v. DUFF.

Criminal Law — Charge Preferred by Deputy of Attorney-General for Province — Absence of Consent or Direction of Trial Judge or Attorney-General—Authority of Deputy — Criminal Code, sec. 673 (a) — Necessity for Preliminary Inquiry before Magistrate.

The accused, William L. Duff, was tried before LAMONT, J., at Moose Jaw, for an offence under sec. 398 of the Criminal Code, and convicted. At the close of that trial the Deputy Attorney-General for the province preferred a charge against him for an offence under sec. 188 of the Code. The charge was preferred without any consent on the part of the learned Judge, and without any express direction or written consent of the Attorney-General, or any direct proof that the Deputy Attorney-General was the agent of the Attorney-General. No preliminary trial of the accused had been had before any justice of the peace or magistrate. Before pleading to the charge the accused, by his counsel, raised the following objections: (1) that there had been no preliminary hearing; and (2) that the charge had not been preferred with the written consent of the trial Judge, or the Attorney-General, or by the Attorney-General, or by any one acting under his direction, or by any person shewn to have been an agent of the Attorney-General, or by any person by order of the trial Judge.

The learned Judge allowed the trial to go on, the accused was found guilty, and a case was stated for the opinion of the Court.

Section 873 A. of the Code, as enacted by the Criminal Code Amendment Act of 1907 (ch. 8), is as follows: "In the provinces of Saskatchewan and Alberta, it shall not be necessary to prefer any bill of indictment before a grand jury, but it shall be sufficient that the trial of any person charged with a criminal offence be commenced by a formal charge in writing setting forth as in an indictment the offence with which he is charged. Such charge may be preferred by the Attorney-General or an agent of the Attorney-General, or by any person with the written consent of the Judge of the Court or of the Attorney-General, or by order of the Court."

The question that arose was whether the Deputy Attorney-General had the authority to prefer a charge under this section, without the written consent of a Judge of the Court or the Attorney-General, and without an order of the Court.

The stated case was heard by WETMORE, C.J., PRENDERGAST, NEWLANDS, and JOHNSTONE, JJ.

Frank Ford, K.C., for the Crown.

W. B. Willoughby, Moose Jaw, for the defendant.

WETMORE, C.J.:—In my opinion, it is narrowed down to two propositions: first, is the Deputy Attorney-General an agent of the Attorney-General within the meaning of the section? Second, is he embraced in the definition given by the Interpretation Act for the word "Attorney-General," or by the language of clause (l) or (m) of sec. 31 of the General Interpretation Act, R. S. C. 1906 ch. 1?

In the first place, I am of opinion that he is not an agent of the Attorney-General within the meaning and intention of sec. 873 A. Before this province was constituted as such, and, of course, while it was embraced in the government of the North-West Territories, an amendment was made to the North-West Territories Act by sec. 11 of ch. 22 of the Acts of 1891, as follows: "In lieu of indictments and forms of indictment as provided by the Criminal Procedure Act, the trial of any person charged with a criminal offence shall be commenced by a formal charge in writing, setting forth, as in an indictment, the offence wherewith he is charged."

There was no provision as to who might prefer the charge under that provision of the law, but it was customary to do it by persons who were called Crown Prosecutors, and who

were appointed by the Department of Justice at Ottawa to act at the respective Courts to which they were appointed. Since provincial autonomy was granted, however, persons were appointed by the Attorney-General's Department at Regina, who perform the same duties and who are styled "Agents of the Attorney-General." After this change was brought about, the amendment of 1907, which I am now discussing, was made, and I am of opinion that the expression "Agent of the Attorney-General," mentioned in the section in question, was intended to cover the person so appointed to attend to criminal business, and styled "Agent of the Attorney-General." It was not intended to embrace the Deputy Attorney-General, who is not an agent of the Attorney-General for the purpose embraced by the section.

Clauses (l) and (m) of sec. 31 of the general Interpretation Act have not, in my opinion, any application to the question at all. I am of opinion, for the purposes of considering the language of the Criminal Code, in so far as the matter under consideration is concerned, that we must go to the defining provisions of that Code, and we cannot give the words a more extensive meaning than the Code permits. That is, if the Code, for instance, gives a limited meaning to the term "Attorney-General," we cannot go to the general interpretation clause for the purpose of giving it a wider meaning. Now the interpretation provisions of the Code do define the term "Attorney-General." Section 2, cl. 2, is as follows: "'Attorney-General' means the Attorney-General or Solicitor-General of any province in Canada in which any proceedings are taken under this Act, and, with respect to the North-West Territories and the Yukon Territory, the Attorney-General of Canada."

The Deputy Attorney-General is not brought within that definition, and, if he is not, his general duties as Deputy of the Attorney-General will not give him the authority, because he is Deputy of the Attorney-General not for the purpose of anything within the lgislative authority of the Dominion Parliament, but only as to his duties within the legislative authority of the local legislature. If it is desired to extend his duties and authorities over anything in the direction claimed, more specific legislation on the part of Parliament will be necessary.

I have, therefore, arrived at the conclusion that the Deputy Attorney-General had no authority to lay this charge, and therefore that the conviction should be quashed.

I do not consider it necessary to express any opinion upon the question raised as to there not having been any preliminary hearing.

NEWLANDS, J.:—Two objections were taken at the trial of this case by the prisoner's counsel: (1) that the charge preferred by Frank Ford, K.C., Deputy Attorney-General, was preferred without the written consent of the Judge of the Court, or the Attorney-General, or by order of the Court; and (2) that no preliminary examination had been held before a justice of the peace.

The learned trial Judge overruled the objections, and allowed the charge to be preferred, upon which the accused pleaded "guilty." The trial Judge then reserved for the opinion of this Court the question, "Was I right in allowing the indictment to be preferred?"

It was contended on behalf of the Crown that the Deputy Attorney-General is included in the Attorney-General mentioned in section 873a by virtue of the Interpretation Act, ch. 1, R. S. C. 1906, sec. 31, cl. (l): "Words directing or empowering a Minister of the Crown to do any act or thing, or otherwise applying to him by his name, of office, include a Minister acting for, or, if the office is vacant, in the place of, such Minister, under the authority of an order in council, and also his successors in office and his or their lawful deputy."

Now, by sec. 31, in every Act, unless the contrary intention appears, words directing or empowering a Minister of the Crown to do any act or thing include his lawful deputy. This interpretation must be controlled by the Criminal Code, sec. 2, sub-sec. (2), where the words "Attorney-General," when used in that Act, mean "the Attorney-General or Solicitor-General of any province in Canada in which any proceedings are taken under this Act, and with respect to the North-West Territories and the Yukon Territory the Attorney-General of Canada." The interpretation to be given to the words "Attorney-General," as used in sec. 873 of the Code, which is similar to 873a, under the provisions of which the charge in this case was preferred, was considered in Abrahams v. The Queen, 6 S. C. R. 10. In delivering the

judgment of the Court Ritchie, C.J., said: "In acting under this statute the Attorney or Solicitor-General or Judge, as the case may be, exercises what is in the nature of a judicial function; he is judicially to decide whether the indictment is proper to be presented to or found by the grand jury;" "and the duty of exercising this judicial discretion . . . is vested in the Attorney-General or Solicitor-General or Judge to be by them personally exercised." "I think, therefore, this being a special statutory power, it must be strictly pursued; the propriety of sending a bill before the grand jury having been confided to the judgment and discretion of the Attorney-General, he cannot extend the provisions of the Act and delegate to the judgment and discretion of another the power which the legislature has authorised him personally to exercise, no power of substitution having been conferred."

Now, as the words Attorney-General, as used in the Code, are interpreted by that Act to mean the Attorney or Solicitor-General of the province, and as the powers conferred upon him by this section are to be personally exercised by him, can the provincial legislature, by authorising the appointment of a Deputy Attorney-General, enlarge the interpretation of "Attorney-General" as given in the Code so as to include the Deputy Attorney-General appointed under the provincial statute? Bouvier's Law Dictionary, at p. 549, under the word "Deputy," says; "In general, ministerial officers can appoint deputies: Comyn's Dig. Officer (D1), unless the office is to be exercised by the ministerial officer in person; and when the office partakes of a judicial and ministerial character, although a deputy may be made for the performance of ministerial acts, one cannot be made for the performance of a judicial act." As the duties required of the Attorney-General by sec. 873a are judicial duties, they cannot, in my opinion, be performed by his deputy.

That the Deputy Attorney-General is not included under agent of the Attorney-General is, I think, clear, there being an officer in each judicial district of the province appointed and acting as an agent of the Attorney-General, and he is the person referred to in that section.

As to the second objection, that no preliminary examination was held in this case, it is argued on behalf of the Crown that under sec. 873a of the Code neither a preliminary investigation before a magistrate nor the preferring of a bill of indictment before a grand jury is required in this province.

but that a charge for any criminal offence may be preferred by the Attorney-General or an agent of the Attorney-General direct to the Court having power to try the offence, without either of these preliminary steps having been taken. If these powers have been conferred upon these officers in this province and Alberta, they are far in excess of the powers conferred upon the Attorney-General or Solicitor-General of the other provinces. There, in cases of emergency, as was pointed out by Gwynne, J., in Abrahams v. The Queen, the discretion of the Attorney or Solicitor-General, as officers responsible to the public, may be substituted for the preliminary examination, and they may prefer an indictment to a grand jury.

Sections 871, 872, and 873 of the Code do not apply in this province, as they all refer to the preferring of a bill of indictment to a grand jury. Section 873a is, therefore, substituted in place of them, and is the only method by which the trial of a person charged with a criminal offence can be commenced. That section provides that in the provinces of Saskatchewan and Alberta it shall not be necessary to prefer any bill of indictment before a grand jury, but it shall be sufficient that the trial of any person charged with a criminal offence be commenced by a formal charge in writing setting forth as in an indictment the offence with which he is charged. In my opinion, that section means that, instead of prefering a bill of indictment to a grand jury, it shall be sufficient to commence the trial with a formal charge in writing preferred as provided in sub-sec. 2 of that section.

It is, I think, clear under the Criminal Code that no indictment can be preferred unless preceded by a preliminary examination before a magistrate, except under the provisions of sec. 873. Now, if this section does not, as I have pointed out, apply to this province, it follows that no charge can be preferred in this province without a preliminary examination, and sec. 873a does not take away that right, and, as stated by Ritchie, C.J., in Abrahams v. The Queen, this section, being a special statutory power, must be strictly construed. To put upon it the construction contended for by the counsel for the Crown would be to confer upon not only the Attorney-General but upon each one of his agents throughout the province the power to prefer a charge against any person without there being a preliminary examination before a magistrate or an investigation by a grand jury. Such wide

powers, so derogatory to the rights of the subject, could only be conferred by express legislation, and not by extending the meaning of a section which, in my opinion, only confers upon these officers the duties of a grand jury.

PRENDERGAST, J.:—I concur.

JOHNSTONE, J.:—The accused Duff was tried and convicted at Moose Jaw before my brother Lamont with a jury, for an offence under sec. 398 of the Criminal Code, after which the Deputy Attorney-General preferred a further charge against the convict for an offence committed contrary to the provisions of sec. 188 of the Code.

Counsel for the accused thereupon objected, as the fact was: (1) that there had been no preliminary hearing; and (2) that the indictment or charge had not been preferred with the written consent of the trial Judge or of the Attorney-General, or by the Attorney-General, or by any one acting under his direction, or by any person shewn to have been an agent of the Attorney-General, or by any person by order of the Judge.

The trial of the charge so preferred by the Deputy Attorney-General, under the circumstances aforesaid, was allowed to proceed, with the result that the accused person was convicted, whereupon the learned trial Judge stated a case for the opinion of the Court en banc, as to whether he was right in allowing such charge to be preferred.

The procedure as to the preferring of charges under the Criminal Code in this province is now regulated by sec. 873a of the Code, which reads: "In the provinces of Saskatchewan and Alberta, it shall not be necessary to prefer any bill of indictment before a grand jury, but it shall be sufficient that the trial of any such person charged with a criminal offence be commenced by a formal charge in writing setting forth as in an indictment the offence with which he is charged. 2. Such charge may be preferred by the Attorney-General or any agent of the Attorney-General, or by any person with the written consent of the Judge of the Court or of the Attorney-General, or by order of the Court."

The first question in this case to be determined is, whether the Deputy Attorney-General can, in virtue of his office as lawful Deputy to the Attorney-General of the province, prefer a charge and place upon trial an accused person for

having committed an offence against the criminal laws, when such person has been committed for trial upon a preliminary hearing, where the depositions taken at such hearing warrant the preferring a charge.

By the Act of Confederation, the administration of justice in each of the provinces is intrusted to the provincial government, and it is therefore the provincial law officers of the Crown whose duty it is to conduct or supervise, as the case may be, criminal prosecutions, such as that conducted against Duff by the Deputy Attorney-General.

The Deputy Attorney-General is not mentioned in sec. 873a of the Criminal Code, and in this respect he is in the same position as the deputy heads of the several departments of the government of Canada. In nearly every Act of the Dominion affecting the various departments of the government of Canada, there is used the word "Minister," an interpretation of which word is given at the front of the Act. Take, for instance, the Government Railway Act, the Railways Act, the Public Works Act, the Militia Act, the Marine and Fisheries Act, the Customs Act, there is in each an interpretation in these words: "In this Act, unless the context otherwise requires, Minister means the Minister of Railways and Canals," or as the case may be. The word "Minister" is used throughout each Act, and no reference is made to the deputy head of the department. This official in each department of the government service does a great deal towards the control and management of the departmental business. This is because he is empowered to do so by virtue of sub-secs. (1) and (m) of sec. 31 of the Dominion Interpretation Act. These sub-sections read: "(1) Words directing or empowering a Minister of the Crown to do any act or thing, or otherwise applying to him by his name of office, include a Minister acting for, or, if the office is vacant, in the place of, such Minister, under the authority of an order in council, and also his successors in such office, and his or their lawful deputy. (m) Words directing or empowering any other public officer or functionary to do any act or thing, or otherwise applying to him by his name of office, include his successors in such office, and his or their lawful deputy."

Upon reference to the Criminal Code we find legislation very similar to that already pointed out as to the word "Minister." This is in sub-sec. 2 of sec. 2 of the Criminal Code, which provides that in the Act "'Attorney-General'

means the Attorney-General or Solicitor-General of any province in Canada in which any proceedings are taken under this Act."

I fail to see why a different and stricter interpretation should be given to the words "Attorney-General" in sec. 873a than that which would be given to the word "Minister," so as to exclude the lawful deputy in the one case and include him in the other.

The words used in sec. 31 of the Interpretation Act, "In every Act unless a contrary intention appears," are certainly very clear, and they must mean that such contrary intention shall appear in the Act the provisions of which are to be construed.

There is no intention, as far as I can see, appearing in any of the provisions of the Criminal Code, that sub-secs. (l) and (m) of sec. 31 shall not apply and thereby exclude the lawful deputy of the Attorney-General, one of the provincial officers of the Crown. In view of these sub-sections, if I should be right, one would expect to find words in sec. 873a excluding from its application the Deputy. To hold that no one, other than the persons mentioned in sec. 873a, or persons named by the Parliament of Canada, may prefer a charge and thereby have the conduct of criminal prosecution in the provinces, has, to me, the appearance of extending to the Dominion Parliament powers intended by the British North America Act to have been conferred upon the provincial legislative bodies.

This is not a question of the power in the Attorney-General to delegate to another the performance of his duties, but a question as to whether or not that other has been named by legislation; in other words, whether the Deputy Attorney-General of this province is the lawful Deputy of the Attorney-General, within the meaning of sec. 31, and under a similar provision contained in the provincial Interpretation Act. In my opinion, he is. To my mind, Abrahams v. The Queen is not an authority to the contrary. All that was held and could be held in that case, which would be binding upon this Court, was that a Crown counsel could not, of his own mere motion alone, prefer a bill of indictment before a grand jury; that counsel had not the power to do so. He could not be said to be a lawful deputy within the meaning of sec. 31.

As to the other objection raised by counsel for the accused—that no preliminary hearing upon the charge had been held before a magistrate—there is no law that a preliminary hearing shall take place before a charge can be preferred. It has been of common occurrence in this province in the past, and in the Territories forming the provinces of Saskatchewan and Alberta for years before the foundation of these provinces, to commence the prosecution of persons for criminal offences, without first having had a preliminary hearing before a justice of the peace. It is said in The Queen v. Lepine: "Prior to the adoption of the Criminal Code, it was permissible to lay a charge before a grand jury and to ask and obtain indictments without any preliminary commitment or even inquiry. As a previous investigation before a magistrate was not an essential condition, in the provinces of Canada, other than Saskatchewan and Alberta, since the Code, this section of which requires a previous commitment or the order of the Attorney-General or the consent of the Judge is an essential preliminary condition before a charge can be laid before a grand jury."

It is provided by sec. 873a, before referred to, that in Saskatchewan and Alberta it shall not be necessary to prefer a bill of indictment before a grand jury, but it shall be sufficient that the trial of a person charged with a criminal offence shall be commenced by a formal charge in writing setting forth as in an indictment the offence with which he is charged. The provision of sub-sec. 4 of sec. 873, "that, except as in this part previously provided, no bill of indictment shall be preferred in any province of Canada," can have no application to the provinces named in sec. 873a. Section 873a, as to Saskatchewan, takes the place of secs. 870-873 of the Code, sections relating to other provinces.

I thnk the questions submitted by the learned Judge in his stated case should be answered in the affirmative.

SASKATCHEWAN.

NOVEMBER 20TH, 1909.

FULL COURT.

RE NORTH-WEST TELEPHONE CO.

Land Titles Act—Instrument not Registrable—Mortgage or Incumbrance—Specific Description of Lands—Inclusion of other Lands not Described—Non-compliance with sec. 98.

Appeal by the company from a decision of the Inspector of Land Titles Offices.

A. Ross, Regina, for the appellants.

Frank Ford, K.C., for the respondent, the Registrar of Land Titles for East Saskatchewan Land Registration District.

The judgment of the Court (WETMORE, C.J., PRENDERGAST, NEWLANDS, JOHNSTONE, and LAMONT, JJ.), was delivered by

NEWLANDS, J.:—The system of land registration in force in this province is a statutory one, the provisions of which are set forth in the Land Titles Act. No instrument can, therefore, be registered in a land titles office unless it is one of the instruments whose registration is provided for, and in form and execution conforms with the requirements of that Act.

Amongst the instruments whose registration is provided for are mortgages and incumbrances, and, whenever in any such instrument any land is intended to be charged with or made security for the payment of an annuity, rent, charge, or sum of money, in favour of any incumbrancee, the instrument must contain an accurate statement of the estate or interest intended to be mortgaged or incumbered, and must, for description of the land intended to be dealt with, refer to the certificate of title on which the estate or interest is held, or give such other description as is necessary to identify the land: Land Titles Act, sec. 98, sub-secs. (2), (3).

In this case the instrument offered for registration (which the Inspector of Land Titles Offices directed the Registrar to refuse to accept, it not being in compliance with the provisions of the Act, and from whose decision this appeal was taken) was a mortgage or incumbrance; it described specifically certain land, and therein complied with the Act, but, by a clause in the same, another instrument was referred to, called a mortgage trust deed, as being annexed to and thereby embodied in and made part of such mortgage or incumbrance. By this reference, this mortgage trust deed became a part of the instrument offered for registration, and it is therefore necessary to consider whether, taking into consideration its terms and provisions, the mortgage or incumbrance offered for registration is such an instrument as the Land Titles Act provides for being registered.

By the inclusion of this instrument in the mortgage or incumbrance, not only are the lands specifically described made security for the payment of money, but the mortgagor "(2) . . doth hereby grant and convey unto the trustee, its successors and assigns, forever, all and singular the lands and premises of the company wherever situate, together with all buildings, improvements, fixed and unfixed machinery, plant, poles, wires, conduits, franchises, licenses, leases, and fixtures, now or at any time during the continuance of these presents, in, upon, about, or belonging to, or used in connection with all or any of the said lands and premises, together with all ways, watercourses, rights, privileges, easements, hereditaments, and appurtenances whatsoever to all or any of the said lands and premises or any lands or premises over, upon, or under which the company has or may hereafter have or acquire any rights of way or easements of any kind, together with all the estate, right, title, and interest whatsoever of the company in and to and upon or under the said lands and every part thereof, and their and every of their appurtenances, to have and to hold all the said lands and premises unto and to the use of the trustee, its successors and assigns, forever, but upon and for the trusts and purposes herein contained; subject, however, to the reservations, exceptions, and conditions mentioned in the original grant thereof from the Crown.

"(3) The company do hereby further grant, assign, and convey to the trustee, its successors and assigns, all the

freehold and leasehold lands and hereditaments that may hereafter be acquired by the company during the continuance of these presents, together with all buildings, improvements, fixed or unfixed machinery, poles, wires, conduits, plant, and fixtures at any time during the continuance of these presents in, upon, about, or belonging to or used in connection with the same, together with all franchises, licenses, and easements that may be hereafter acquired by the company upon, over, or under any lands or premises upon the same trusts."

Now there is no question that this instrument (provided that it is properly executed and that the mortgagors have power to make the same, questions that I do not think it necessary for me to consider) is a binding and effective instrument between the parties, and that its intention and effect is to make all the lands of the mortgagors now owned by them, as well as such as they may thereafter acquire during the continuance of such instrument, security for the payment of money, and, that being the case, I need only say that sec. 98 of the Land Titles Act has not been complied with, such land not being given a description by which to identify it, and that therefore the instrument cannot be registered. It was argued by Mr. Ross, for the appellants, that the Registrar should ignore the provisions of this mortgage, as to lands not described, as well as after-acquired lands, and only register the instrument against the lands specifically described. This argument resolves itself simply into this, that the Registrar should ignore the provisions of the Land Titles Act, and, stated in that way, it contains its own refutation, the Registrar's duty being to carry out the provisions of the Act, not to ignore them.

I think it is unnecessary for me to discuss what would be the effect of the registrar ignoring the Act and registering an instrument such as this one. I need only say that for his action the assurance fund would be responsible, and a subsequent transferee of the mortgage, if not the mortgagees themselves, might have an action against that fund, because the registrar did not, when he registered the instrument, register it against all the property of the mortgagors, in the event of the specifically described lands not being all their property.

For these reasons I think the appeal should be dismissed.

SASKATCHEWAN.

NOVEMBER 20TH, 1909.

FULL COURT.

RE BROOKS.

Land Titles Act—Certificate of Title— Registration of Executions against Lands—Assignment by Execution Debtor for Benefit of Creditors — Assignments Act — Right of Assignee to Certificate of Title Freed from Executions.

Appeal by H. H. Campkin, assignee for the benefit of creditors of the estate of Edwin J. Brooks, an insolvent, from a decision of the Inspector of Land Titles upholding a refusal of the Registrar of the Assiniboia Land Registration District to issue to the appellant a certificate of title to lots 4, 5, and 6 in block 22, Indian Head, freed from certain executions issued against Brooks, copies of which had been registered in the land titles office.

A. L. Gordon, Regina, for the appellant.

Frank Ford, K.C., for the Inspector.

The judgment of the Court (WETMORE, C.J., PRENDERGAST, NEWLANDS, JOHNSTONE, and LAMONT, JJ.), was delivered by

LAMONT, J.:—On 21st December, 1907, Edwin J. Brooks made an assignment for the benefit of his creditors under the Assignments Act to H. H. Campkin, of all his personal property and all his real estate, credits and effects, which might be seized and sold under execution, and, pursuant to the assignment, Campkin entered into possession of the assigned property. Between 7th November, 1907, and 16th January, 1908, 18 separate executions were issued against Brooks by his respective creditors, and copies of these executions were transmitted to the Registrar of land titles. After the registration of these executions, the assignee made application to the Registrar to be registered as owner of lots 4, 5, and 6 in block 22, Indian Head, the title to which had up to that time been in the name of the debtor Brooks.

The Registrar issued a certificate of title for the said lands in the name of the assignee, but indorsed thereon a memorandum that the assignee's title was subject to the executions registered against Brooks. Campkin then applied to the Registrar to cancel the indorsement of the executions on his certificate of title. This the Registrar refused to do. Campkin then applied by way of petition to the Inspector of Land Titles for an order directing the Registrar to remove these executions from his title. The Inspector upheld the decision of the Registrar, and from the Inspector's decision the assignee now appeals to this Court.

The reason given by the Registrar for refusing to issue the certificate of title to the assignee freed from the executions, was that the Assignments Act, under which the property of the debtor became vested in the assignee, expressly stated that, as regards lands, the vesting of the debtor's property in the assignee shall be subject to the provisions of the Land Titles Act, and that the provisions of the Land Titles Act, sec. 129, require him to indorse the executions on the certificate of title. Section 6 of the Assignments Act, which came into force on 1st August, 1906, is as follows: "Every assignment made under this Act for the general benefit of creditors shall, as to the description of the property comprised therein, be valid and sufficient if such description is in the words following, that is to say: 'All my personal property and all my real estate, credits and effects, which may be seized and sold under execution,' or if it is in words to the like effect; and an assignment containing a description so expressed shall vest in the assignee all the real and personal estate, rights, property, credits and effects, whether vested or contingent, belonging at the time of the assignment to the assignor, except such as are by law exempt from seizure or sale under execution or other legal proceedings, subject, however, as regards lands, to the provisions of the Land Titles Act."

The provision of the Land Titles Act dealing with executions is sec. 129, the first sub-section of which requires the sheriff, upon delivery to him of an execution affecting lands, to deliver or transmt to the Registrar of Land Titles a certified copy of the writ and indorsements thereon. Subsections 2, 3, and 4 of said section are as follows:—

(2) Such writ shall bind the land covered thereby only from the time of the receipt of a certified copy thereof by

the Registrar for the registration district in which such land is situated.

"(3) From and after the receipt by the Registrar of such copy, no certificate of title shall be granted and no transfer, mortgage, incumbrance, lease, or other instrument executed by the execution debtor of such land shall be effectual except subject to the rights of the execution creditor under the writ while the same is legally in force.

"(4) The Registrar, on granting a certificate of title, and on registering any transfer, mortgage, or other instrument executed by the execution debtor affecting such land, shall, by memorandum upon the certificate of title in the register and on the duplicate issued by him, express that such certificate, transfer, mortgage, or other instrument is subject to such rights."

It will be observed that this section enacts that after the registration of an execution no transfer of the lands shall be effectual except subject to the rights of the execution creditor under his writ of execution, and the Registrar is enjoined, on issuing a certificate of title, to indorse on the certificate a memorandum that such certificate is duly subject to such rights. What are the rights of an execution creditor under a writ of execution registered against the lands of a debtor who has made assignment for the benefit of his creditors under the Assignments Act? The answer to the question seems to me to be found in sec. 8 of the Assignments Act, which reads as follows: "An assignment for the general benefit of creditors under this Act shall take precedence of all attachments of debts by way of garnishment, where the money has not been actually paid over to the garnishing creditor, as well as of all other attachments and of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of execution or attaching creditors for their costs."

By this section the rights of an execution creditor under his execution are expressly subordinated to the rights of the assignee under his assignment, which takes precedence of all executions not completely executed by payment, but subject to the lien, if any, of the execution creditors for their costs. The assignee, therefore, is entitled to the land of the execution debtor which passes under the assignment for the benefit of creditors, freed from all executions, subject only to the lien of the execution creditors for costs, if they or

any of them have such lien. In the present case no question arises as to the lien of the creditors for their costs, because evidence was produced to the Registrar, to which he took no objection, that the assignee had paid to all of the execution creditors their costs of suit, including the costs of executions. I am, therefore, of opinion that the assignee was, under these circumstances, entitled to have a certificate of title issued to him freed of the executions.

At the hearing of the appeal it was argued that, even if the intention of the Assignments Act was to give the assignment for the benefit of creditors priority over executions against the debtor, it was not the duty of the Registrar to determine the question as to whether the executions should be omitted from the certificate of title to the assignee—that the vesting of the land in the assignee under the assignment was made expressly subject to the provisions of the Land Titles Act, which, by sec. 129 above quoted, require the Registrar to indorse on the certificate of title a memorandum that the title was subject to the rights of execution creditors. If sub-sec. 4 of sec. 129 requires this literal interpretation, I am satisfied that it is continually violated. As I understand the practice of the land titles office, where an execution creditor registers an eexcution against the land of his debtor, and subsequently obtains a transfer of the land, the Registrar, on issuing to him a certificate of title, does not indorse thereon a memorandum that his title is subject to his own execution. The Registrar himself determines what are the rights of the execution creditor under his execution, and decides that these rights are merged in the transfer and he issues a certificate of title to the execution creditor without indorsing thereon a memorandum of the execution. As to his duty in respect to mortgages, see Reeves v. Konschur, 10 W. L. R. 680. If, in these circumstances, it is the duty of the Registrar to determine whether the certificate of title should or should not be issued without indorsing thereon the execution, it seems to me equally his duty to determine whether or not an execution should be indorsed on the certificate of title issued under an assignment for the benefit of creditors, where the legislature has expressly enacted that the assignment shall take precedence of the executions, subject only to a lien for costs, which lien, it has been satisfactorily proven to him, has been satisfied. If this were not so, the assignee in the present case must take the title

to the land of the debtor charged with 18 executions, and before he can deal with the land and carry out the object of the Assignments Act he must bring 18 separate actions to have these executions removed; and, as the object of the Act was to effect a speedy and equitable distribution of the assets of the debtor among his creditors, the Court ought not to put a construction upon the language which will render nugatory the object of the Act, unless there is no other reasonable interpretation at which to arrive.

It was further contended that the case of Federal Life Assurance Co. of Canada v. Stinson, 13 O. L. R. 127, affirmed in Scott v. Swanson, 39 S. C. R. 229, shewed that an execution creditor might in certain cases acquire an interest or a charge under his execution by consolidating it with a preceding mortgage which would take priority of an assignment for the benefit of creditors, and that it could not be the duty of the Registrar to determine such questions. As I read that case, it does not affect the question in this appeal. There the Court expressly stated that the right of the defendant to priority for the amount of his executions was not by virtue of the executions at all, but by virtue of the adjudication of the Court; that the moment he had proved his debt in the Master's office in the foreclosure proceedings, his executions in the sheriff's hands might have been allowed to expire without affecting his lien on the lands. This lien he held, not by virtue of his executions, but by virtue of the order of the Court made prior to the assignment for the benefit of creditors.

The appeal should, in my opinion, be allowed, and the Registrar directed to remove the memorandum of the executions from the assignee's certificate of title, and also from the certificate of title to Alexander M. Fraser, to whom the assignee has transferred lot 4.

SASKATCHEWAN.

NOVEMBER 20TH, 1909.

FULL COURT.

IMPERIAL BANK OF CANADA v. KIEVELL.

Sale of Goods—Promissory Note Given for Price of Machine — Action on, by Indorsees — Defence that Machine not as Ordered — Finding of Fact — Warranty, Express or Implied.

Appeal by the defendant from the decision of RIMMER, District Court Judge for the Judicial District of Cannington, in favour of the plaintiffs, in an action to recover the amount of a lien note made by the defendant to Smith & Ingolls and duly assigned by them to the plaintiffs.

W. H. Wiliams, Carlyle, for the defendant.

A. M. Matheson, Arcola, for the plaintiffs.

The judgment of the Court (WETMORE, C.J., PRENDERGAST, NEWLANDS, JOHNSTONE, and LAMONT, JJ.), was delivered by

LAMONT, J.:—The note was given for the price of one Superior disc harrow and one Hero fanning mill. The defendant does not deny his liability on the note in so far as the price of the disc harrow is concerned, but he does dispute liability as to $45, the price of the Hero fanning mill, on the grounds that he did not order a Hero mill at all, but a Fosson, and Smith & Ingolls sent him instead the Hero mill, and that this mill could not be made to work. And, further, that Mr. Lowe, who was Smith & Ingolls's salesman, gave an express warranty that the mill would do as good and satisfactory work as any cleaner, and if it failed to do that they would take it back.

The learned trial Judge has found as a fact that the defendant purchased a Hero mill and not a Fosson, and with that finding I agree. The defendant went to the place of business of Smith & Ingolls for the purpose of purchasing a mill. They had no Fosson mills on hand, but had a Hero mill on exhibition in their warehouse. Mr. Lowe swears that he shewed this mill to the defendant, and that, after

seeing it, the defendant purchased the same, and gave a note for the price of the mill and the price of a harrow, which he also purchased. In this statement he is corroborated by the note itself, which on its face contains the following clause: "This note is given for one 12/16 Superior wheel disc harrow and 1 Hero fanning mill." The defendant says these words were not on the note when he signed it. He, however, admits that they promised to deliver the mill to him in 4 days. He also admits that they had no Fosson mills in stock. The Fosson mill is manufactured at Minneapolis, and the evidence shews that it would take at least two weeks to get one delivered to the defendant. Smith & Ingolls shipped him the Hero mill the day he signed the note, and he admits receiving it within 4 days as promised. The learned trial Judge was, in my opinion, justified in finding as a fact that the defendant purchased a Hero mill.

As to the warranty. The only express warranty alleged by the defendant is that contained in a leaflet setting out the advantages to the farmer not of a Hero mill but of a Fosson. The document does not contain any reference whatever to a Hero mill. The defendant says that when he signed the note he asked, "What guarantee have I that the mill will be as represented, as you hold my note for same?" and that Mr. Lowe turned and picked up the leaflet and said, "This is our guarantee. We will stand behind it every time." Mr. Lowe admits that he may have handed the leaflet to the defendant, but denies that he ever said it was their guarantee. On this point the learned trial Judge, who had the witnesses before him, has accepted the testimony of Lowe as against that of the defendant, and has found that there was no express warranty given. There is nothing in the evidence to satisfy me that the conclusion of the trial Judge was not correct. But, even if the defendant's version were right, the only warranty which he contends was given was that contained in the leaflet. That document, however, does not contain any such warranty as alleged by the defendant. It contains a large number of paragraphs setting out the mechanical structure of the Fosson mill and the superior advantages thereof, and then contains this clause, which is relied upon by the defendant as containing the warranty: "Now we have told you the facts about the Fosson Automatic Grain Cleaner and Grader. We will stand right behind these statements all the time, and we are willing to place the mill in competition with any

cleaner made at any time, and if we cannot make the machine do all we claim for it we do not want you to keep it."

Here they say that if they cannot make the mill do all they claim for it they do not want the purchaser to keep it, but nowhere do they say that it will do good and satisfactory work, or anything from which such a warranty could be spelled. There was, therefore, no express warranty given with the sale of the mill. Is there any implied warranty attaching thereto?

As the evidence shews that the defendant bought the Hero mill which Smith & Ingolls had in their warehouse at the time, it was the sale of a specific and ascertained article which the defendant had examined and which he purchased, as he admits, relying entirely on his own judgment. Under these circumstances, there is no implied warranty as to the quality of the mill or its fitness for any particular purpose: Sale of Goods Ordinance, sec. 16.

The appeal should, in my opinion, be dismissed with costs.

SASKATCHEWAN.

WETMORE, C.J. NOVEMBER 25TH, 1909.

CHAMBERS.

MOOSE MOUNTAIN LUMBER AND HARDWARE CO. v. PARADIS.

Contempt of Court—Disobedience of Injunction—Motion to Commit Defendant—Service of Original Order with Summons to Continue—Indorsement of Memorandum Prescribed by Rule 330—Restraining Order—Original not Shewn when Service Effected—Knowledge of Defendant of Order and that Plaintiffs Intended to Pursue it — Appearance of Counsel on Summons—Delay in Serving Continuing Order—Presumption of Abandonment—Practice.

Application by the plaintiffs for an order to commit the defendant for disobedience to an injunction order.

R. A. Gordon, Regina, for the plaintiffs.

E. W. F. Harris, Arcola, for the defendant, raised a number of objections.

WETMORE, C.J.:—On the 17th September last an injunction order was granted by my brother Lamont restraining "the defendant, his servants, workmen, and agents, from removing or destroying the buildings erected on the lands in question herein, namely, the south-west quarter of section 4 in township 8 in range 7 west of the second meridian in the province of Saskatchewan, or cutting or removing or in any way interfering with the crop raised on the said lands in the year 1909, until Monday the 27th day of September, 1909, or until the disposition of this motion to be made as hereinafter mentioned;" and there was embodied in the order a summons calling upon all parties concerned to attend before the presiding Judge in Chambers at the Court House in Regina, on the 24th September, at 10 a.m., on the hearing of an application on behalf of the plaintiff that the injunction order be continued until the trial of the action. A copy of this injunction order, of course including the Chambers summons referred to, was served upon the defendant personally on the 20th September; and on the 25th of that month, after hearing counsel for the plaintiffs, and Mr. Harris, who appeared for the defendant, my brother Lamont made an order that the interim injunction should be continued until the trial of the action. This last mentioned order was personally served on the defendant on the 21st October, together with a copy of the original interim injunction order. On the 20th October one McKee, who was employed by the plaintiffs to do so, proceeded to the quarter section mentioned in the original injunction order for the purpose of threshing a quantity of flax then being upon that land. Such flax was at the time lying in winrows upon the land. Upon reaching the land and entering it, he was forbidden by the defendant to enter thereon, or to in any way touch or interfere with the flax. McKee went upon the land and commenced to thresh, and the defendant thereupon entered with his threshing crew and engine, compelled McKee to cease his threshing operations, and proceeded to thresh the flax with his threshing outfit, and, having done so, loaded the flax so threshed upon his waggons and removed the same from the land.

A number of objections were taken to the order for commitment going. In the first place it was objected that the copy of the injunction order served was not indorsed with the memorandum prescribed by Rule 330 of the Judicature Or-

dinance. That Rule is identical with Rule 5 of Order XLI. of the English Rules of Court. That objection is disposed of by Selous v. Croydon Rural Sanitary Authority, 53 L. T. R. 309, and Hudson v. Walker, 64 L. J. Ch. 204, where it was held that the Rule referred to a mandatory judgment or order to do something, and did not apply to a restraining order, as was the injunction order herein.

It was further objected that the affidavits of service did not shew that the original injunction order was, at the time of service, shewn to the defendant. I incline to the opinion that where there is no other means of ascertaining that the party served was aware of the order of the Court or will be presumed to have been so aware, the proper practice is to exhibit the original order to the party proposed to be moved against, at the time of the service of the order. Rule 1 of Order LXVII. of the English Rules, which I am of opinion is in force in this province, provides as follows: "Except in the case of an order for attachment, it shall not be necessary to the regular service of an order that the original order be shewn if an office copy of it be accepted."

The author of "The Yearly Practice for 1909," in a note to this Rule, states as follows: "The meaning seems to be, except in the case of an order disobedience to which may be punished by attachment."

I incline to the opinion that that is the proper interpretation to be put upon the Rule, but I am further of opinion that the proceedings in this case clearly shew that the defendant was aware what the order of the Court was, and that the plaintiffs intended to pursue the injunction. My reasons for stating that are, that Mr. Harris, a solicitor, as I have before stated, appeared to shew cause against the summons, and the summons was included in the injunction order. That order was served upon the defendant, and Mr. Harris must have got his instructions to appear from him, and he therefore must have been aroused to the necessity for employing counsel by reading that order. It is very difficult for me, under such circumstances, to believe that he was aware of that part of the order requiring him to appear at Chambers, and was not aware of the restraining part of it. In fact I find that he was aware of it.

In United Telephone Co. v. Dale, 25 Ch. D. 778, Pearson, J., in dealing with a question of this character, lays down at p. 787 the following: "The Court would be to a great

extent incapable of doing its duty to itself, as well as to Her Majesty's subjects, if it were to say that, with perfectly accurate knowledge of the order of the Court, a defendant is at liberty to defy the Court's authority, and then come to the Court and say, 'You cannot visit me for that breach of your order, because the order has not been served upon me.' What is the necessity for serving an order upon a defendant, if he knows perfectly well without that service what it is which he is bound to obey?"

If that is correct in a case where there was no service of any sort, a fortiori it is correct where a copy of the order has been served, and the parties served act upon it.

But it was urged, inasmuch as the order of the 25th September continuing the injunction order was not served until the 21st October, and after the alleged breach of the injunction had been committed, that there was undue delay on the part of the plaintiffs in serving such continuing order, and therefore they cannot succeed on this application. That is the only question in this case which has given me any serious difficulty; but, when I consider the provision of the original injunction order, which restrained the defendant until the 27th September "or until the disposition of the motion to be made as hereinafter mentioned," I come to the conclusion that the delay, under the circumstances, will not warrant my refusing the application to commit. The defendant must have been aware of the terms of the order which I have just quoted, for the reasons before stated. The question that arises is, was the defendant led to believe, by reason of the delay in taking out and serving the order extending the injunction, that the original order had been abandoned, and was he justified in so believing? I come to the conclusion that, under the circumstances of this case, he was not justified in so believing. I think it natural that he must have been aware that if the application had been refused his solicitor would know it and would have advised him, and would have taken out an order setting the injunction aside or refusing to continue it. Not having received any notification to that effect, he ought reasonably to have supposed either that the Judge still had the matter in deliberation, or that the order continuing had been made. It was not a case where the injunction restrained him up to a certain date and gave leave to apply at a time before that date to continue the injunction, but he was restrained until

the disposition of the motion to be made as mentioned in the summons which was served upon him. There is no doubt that an unreasonable delay upon the part of the party taking out the injunction order and in serving it, would be fatal. In United Telephone Co. v. Dale, at p. 786, Pearson, J., in commenting upon the remarks of Lord Eldon in Vansandau v. Rose, 2 Jac. & W. 265, states as follows: "But in giving judgment Lord Eldon said, 'In this case, if the warrant of committal is sent to me, I think that I shall not hesitate to sign it. What I have now stated must be subject to this observation, that there has been no delay in endeavouring to get the order drawn up, and the injunction under seal, and serving it when obtained.' There, again, I think he is merely stating the general rule that, in any case in which the plaintiff has been guilty of such laches that he may possibly have misled the defendant, this Court will not interfere if he has not served the order, shewing by its service that he intends to act upon it. I use the word 'possibly' in its largest and widest sense, to shew that this Court will never run the risk of doing that which may be harsh or unjust to the defendant in a case of this kind, by committing him to prison for a breach of an injunction, if there be the slightest doubt whatever, owing to the conduct of the plaintiff, he may not have been drawn into the idea that it never was the plaintiff's intention to enforce the injunction. But I do not believe the rule to be, and I shall not act upon the rule as it has been stated to me, that in no case will the Court enforce obedience to its injunction by means of a committal to prison, simply upon the ground that the order has not been served, when it appears beyond all doubt or dispute that the defendant is aware that the injunction has been granted, and that it is the intention of the plaintiff to enforce it."

I am of opinion that that lays down the rule correctly, but I am also of opinion that the original injunction having been served, and the defendant having notice of the restraining part of it, as I have stated, and the party having been restrained until the motion was disposed of, it was incumbent upon the defendant, before he did that which the injunction order restrained him from doing, to ascertain whether or not the motion referred to had been disposed of. I can quite understand that, where a party obtaining an injunction order allows a great length of time to elapse

without serving the order continuing the injunction, the party moved against might reasonably come to the conclusion that it was abandoned, but that is not the case here, because the original restraining order had been served. It is also material to the question under consideration that the plaintiffs' agent, before the defendant entered upon the land to deal with this flax, had entered and actually commenced threshing. This ought to have put the defendant on his guard, and apprised him that the plaintiffs were pursuing their injunction. Nevertheless, he actually drove the agent away and proceeded to thresh and remove the flax himself.

There is another objection that presented itself to my mind, and that is that there is no direct evidence that the flax which the defendant removed was a part of the crop grown upon the land in question for the year 1909, but, in view of the fact, first, that such objection was not raised by Mr. Harris, and, second, that the flax was lying in winrows, I think I am justified in coming to the conclusion that it was part of the crop of 1909.

The order will be that the commitment issue and that the defendant pay the costs of this action.

SASKATCHEWAN.

WETMORE, C.J. NOVEMBER 26TH, 1909.

CHAMBERS.

MILLER v. ROSS.

Judgment—Default of Defence—Motion for Judgment on Statement of Claim—Application for Leave to Defend—Affidavit of Merits Made by Solicitor — Insufficiency — Question of Law Appearing on Face of Statement of Claim—Terms.

Motion by the plaintiffs for judgment against the defendant Ross in default of defence.

A Ross, Regina, for the plaintiffs.

H. T. Thomson, Regina, for the defendants.

WETMORE, C.J.:—According to the statement of claim, the plaintiffs entered into an agreement with the defendant Ross to purchase from him a lot of land in North Battleford, for which they agreed to pay him $925 on the execution and delivery of the contract; $412.50 on the 22nd October, 1907; and $412.50 on the 22nd April, 1909. The plaintiffs paid the $925 and the first instalment of $412.50 due on the 22nd October, 1907, and was ready and willing to pay the final instalment of $412.50 on the 22nd April, 1909, but the defendant Ross was not then and never has been the registered owner of the land and was unable to give a transfer. The plaintiffs became aware of that fact after the final payment became due, and they repudiated the contract, and pray for a declaration that the contract is rescinded, for re-payment of the sums paid to Ross on account of it, and a declaration that the plaintiffs are entitled to a lien on the interest of the defendant Ross in such land.

Entry of appearance on behalf of both defendants was made by Mr. Panton; an order for security for costs was granted, and was practically complied with on the 18th June, 1909, and notice of such compliance was served upon the agents for Mr. Panton on the 15th October. No statement of defence has been delivered by the defendant Ross, and the plaintiffs applied for judgment against him for default in pleading. A summons was granted for leave to sign judgment for such default.

The plaintiffs' right to the relief claimed was disputed, by reason of objections appearing, as was alleged, on the face of the statement of claim, only one of which I consider to be worthy of consideration, and that is, that the claim does not allege a demand for a transfer of the land when the last instalment of the purchase price became due, because if a demand had been made the defendant might have procured a title. Hamilton v. McNeil, 2 Terr. L. R. 31, was cited in support of that contention. I am not disposed, under any circumstances, to determine that question upon an application of this sort. It is possible that a case may arise, on an application to set aside a judgment and let the defendant in upon the merits, where the facts or the question, as the case may be, are very clearly against the defendant having any defence at all, where the meritorious nature of the defence might be considered. That course seems to have been adopted in Richardson v. Howell, 8 Times L. R. 445. This is an en-

tirely different application. A defendant on an application to set aside a judgment regularly signed comes to ask the indulgence of the Court, and his application will not be granted unless he satisfies the Court that he has reasonable grounds of defence or for inquiry. In this application the plaintiff applies for what he is entitled to under the practice, and the defendant will not be allowed to dispute the application on grounds which would have opened grounds of defence if properly pleaded or set up by some substantial application on his part.

But application was made to let the defendant Ross in on the merits, which I think was quite in order. In support of that application an affidavit of Mr. Panton, and no other affidavit, was read. It is now the acknowledged practice that as a general rule on an application to set aside a regular judgment on the merits an affidavit should be produced setting forth what the character of the defence is, and by that I understand that this must be established in a general way at least. It must not be merely an affidavit setting forth the character of the defence, but there must be something to shew that the defence is real and not merely imaginary, and that it is a defence worthy to be entertained. I see no reason, where the defendant is in default as the defendant Ross is here, and wishes to prevent a judgment being signed against him which the plaintiff is entitled to sign, why the merits of the proposed defence should not be proved in the same way. Mr. Panton, in so far as his affidavit affects this question, merely sets out as follows; "I believe that the defendants have a good defence as set out in the statements of defence drawn herein, and that they should be permitted to try such action on their defences." Annexed as exhibits to this affidavit are the defences which he proposed to put in for each of the defendants, and, referring to the proposed defence of Ross, it sets up what I consider to be a good and valid defence if the facts therein stated are true. Mr. Panton's affidavit does not shew that. It would not be sufficient, even under the old practice, where the character of the merits was not required to be set forth. In Bromley v. Gerish, 6 M. & G. 750, Erskine, J., referring to the requirements of the affidavits, states as follows: "The ordinary form of affidavit is that the defendant has 'a good defence to this action on the merits.' Where it is made by the party, the words "as

he is advised and believes" are added; where by the attorney or managing clerk of the attorney, the form is "as he is informed and verily believes."

If an affidavit of this character would not be sufficient under the old practice, a fortiori it is not sufficient under the present; if a defendant was allowed to come in on such an affidavit, he might in very many instances very easily get a judgment set aside when there was no justifiable cause for doing it. It might be a very easy matter for a person to convince his solicitor that he has a good defence and so enable him to swear as Mr. Panton has done. I am not prepared to say that if Mr. Panton had stated as the reasons for his belief that "he had been so informed by the defendant," it might not have been sufficient on an interlocutory application like the present. But the rule of practice is that only facts in the knowledge of the deponent must be stated in an affidavit except on interlocutory applications, when statements as to his belief may be admitted with the grounds of such belief. Mr. Panton cannot possibly state anything here within his knowledge. At any rate he does not state that the facts are so within his knowledge, and he does not state the grounds of his belief. If the defendant's application to be let in rested entirely upon that affidavit, it would not be granted; but, as I have stated before, counsel for Ross at the hearing of the application raised a ground of defence in law appearing on the face of the statement of claim which I believe to be worthy of consideration. Can I allow Ross to file his defence in view of that fact? In Fardon v. Richter, 23 Q. B. D. at p. 129, Huddleston, B., in dealing with the question of the necessity for an affidavit in order to set aside a regular judgment, states as follows: "During the argument I was inclined to doubt whether such an affidavit could be always necessary. But in Smith v. Dobbins, 37 L. T. N. S. 777, the present Master of the Rolls appears to have stated that it was 'an inflexible rule' that a regular judgment properly signed could not be set aside without such an affidavit, and there are statements in the manuals of practice to much the same effect. The expression is perhaps strong, but, where there is no such affidavit, it is only natural that the Court should suspect that the object of the applicant is to set up some mere technical case. At any rate, when such an application is not thus supported, it ought not to be granted except for some very sufficient reason."

Evidently there that learned Judge contemplated that there might be a sufficient reason for granting leave to defend when there was no affidavit. I agree with that conclusion, and I think that it equally applies to a case like the present where no judgment has been signed but the defendant asks to be let in, and I am of opinion, entirely outside of Mr. Panton's affidavit, that there is quite sufficient to allow the defendant to come in and defend and raise the question of law so suggested by counsel.

I have, therefore, arrived at the conclusion that the defendant Ross should have leave to enter his defence, and, having arrived at that conclusion, I see no reason why I should limit him to defending only on the ground so set up by counsel at the hearing. Having concluded to let him in, I see no reason why he should not be allowed to set up any matter of defence which he may consider to be open to him. No injustice can be done to the other side by so doing. The plaintiffs have not been allowed to sign judgment, and, that being so, the defendant, it seems to me, should have open to him all available matters of defence. I will allow therefore the defendant Ross to file his defence, such defence to be delivered not later than the 10th December next. The defendant must consent, as part of the terms of this indulgence, to go to trial at the next sittings for Saskatoon, if the plaintiffs desire to do so, and the defendant Ross must pay the costs of this application. If the defendant does not comply with the terms of the order by delivering his defence within the time above prescribed and consenting to go to trial, the plaintiffs' application will be granted, and I will specify the character of the relief to be granted, on an ex parte application to me.

So far as the defendant Bachelor is concerned, the action has been discontinued as against her, I am not able to see any grounds whatever for making her a party to this action. She does not appear to me to be interested in any way whatever.

SASKATCHEWAN.

WETMORE, C.J. NOVEMBER 29TH, 1909.

CHAMBERS.

LANKIN v. WALKER.

Injunction — Impeaching Bill of Sale — Action under Preferential Assignments Act and 13 Eliz. ch. 5—Simple Contract Creditor — Right to Restrain Defendants from Dealing with Property — No Proof of Existence of other Creditors.

Motion by the plaintiff for an order continuing an interim injunction.

H. T. Thomson, Regina, for the plaintiff.

P. H. Gordon, Regina, for the defendants.

WETMORE, C.J.:—The statement of claim sets forth that the defendants Weedin Walker and Gurney T. Walker entered into a bond with the plaintiff in the penal sum of $810.64, conditioned for the paying by the defendants the Walkers to the plaintiff of the sum of $810.64, by delivering to the elevator at Radisson a sufficient amount of grain to discharge such obligation immediately upon the threshing of the grain harvested on section 35-40-10 W-3 and the south-west quarter 3-41-10 W-3; that the indebtedness above mentioned was incurred by the defendants the Walkers to the plaintiff as tenants to her of the above lands; that the crop on the lands has been harvested and delivered to the elevator, but the defendants the Walkers refused to pay either the sum of $810.64 or to deliver to the plaintiff the grain necessary to liquidate that indebtedness, and, instead of paying the plaintiff (the landlord of the said Walkers) that amount for the rental of such lands, they entered into a fraudulent conspiracy with the defendant Hingley to defeat the claim of the plaintiff by delivering to Hingley a bill of sale, dated the 27th September last, of all the grain the defendants the Walkers grew upon the said lands, for the pretended consideration of $1,500, and that the defendants the Walkers delivered such grain to the elevator company at Radisson in the name of the defendant Gurney T. Walker; that the defendant Hingley has not paid to the Walkers or either of

them the sum of $1,500, but has given to them a promissory note or some other instrument representing the consideration of the bill of sale; that the grain is warehoused in the elevator of the defendants the elevator company; that the bill of sale and all transfers made in connection therewith are, to the knowledge of the defendants other than the elevator company, a fraud upon the plaintiff and all the other creditors of the defendants the Walkers, and were made and entered into to defeat, hinder, and delay such creditors, and that this action is brought on behalf of all the other creditors of the defendants the Walkers, as well as the plaintiff; and they pray an injunction restraining the Walkers from negotiating or transferring or in any way dealing with any instrument given by Hingley as consideration for or in connection with the bill of sale, and restraining the defendant Hingley from paying to the defendants the Walkers any moneys or delivering to them any note or other instrument in connection with such bill of sale; and restraining the elevator company from paying any of the defendants, or their assignees, for any grain now stored with them by the defendants the Walkers or either of them in their warehouse, or delivering such grain to said defendants or their assignees; and also an order setting aside the bill of sale and transfer.

His Honour Judge MacLean, of the Battleford District Court, granted an injunction order restraining the defendants for 8 days, in the terms of the prayer in the statement of claim for an injunction. A summons was taken out before a Judge of this Court to continue that injunction, and it came on for hearing before me. Objection was taken to the continuation of such injunction, on the ground that it was improperly granted for a number of reasons. The action is practically alleged in the statement of claim to be brought under the Preferential Assignments Act of this province (ch. 25 of 1906), and under 13 Eliz. ch. 5.

The facts set forth in the statement of claim purport to be verified by the affidavit of the plaintiff, and, possibly with the exception of the bond referred to, that affidavit deposes merely to matters of belief, without setting forth the grounds of such belief. There is also an affidavit of the plaintiff's solicitor in which he deposes that the defendant Weedin Walker, at an interview on the 28th September, when requested to pay the plaintiff's claim, stated that he had got things fixed so that he would not have to pay it, and that the

plaintiff could not make him pay it; that he would see that a portion of the plaintiff's claim which related to seed grain would be paid, as it was protected by a chattel mortgage; but that he and Gurney T. Walker would never pay the balance of the plaintiff's claim; that, upon being asked how he had fixed things to defeat the plaintiff's just claim, he stated that he did not consider that it was a just claim, but in any event he had sold all the interest of himself and Gurney T. Walker in the grain to Hingley on the 27th September and given a bill of sale therefor, and that Hingley had paid him $1,500 for his interest in the crop, and Hingley was now the owner of it; that he had assigned the warehouse receipt to Hingley; and that he had had it fixed by a lawyer so that it would stand law, and defied the plaintiff to collect the debt. The only evidence which could possibly be held to deny that Hingley had paid the $1,500 for the grain is that the solicitor went to the only bank in Radisson, and ascertained that no transaction had been put through the bank whereby $1,500 had changed hands, and he did not believe that the defendant Hingley ever paid to the Walkers that sum, and that, if there was ever any consideration for the bill of sale, he believed it was in the form of a note or other evidence of debt. There are some other matters of belief stated in the solicitor's affidavit, but the grounds of such belief appear to me to be all conjecture and imaginary.

In London and Blackwall R. W. Co. v. Cross, 31 Ch. D. 358, Lindley, L.J., at p. 369, states the following: "The very first principle of injunction law is that prima facie you do not obtain injunctions to restrain actionable wrongs, for which damages are the proper remedy."

That is very well settled law, and it may be carried further by stating that prima facie you do not obtain injunctions to restrain actionable wrongs when there is an adequate remedy at law. I can find nothing in the statement of claim or the affidavits used to indicate that the plaintiff has not an adequate remedy by suing upon the bond. Evidently the grain did not belong to her; she had no lien upon it; she chose to rely upon the security of the bond and of the parties to it. It does not follow that because this grain has been transferred to Hingley the Walkers have no other property upon which a judgment against them for the amount of the bond could be realised. There is no allegation that the Walkers are insolvent or that the property assigned to Hing-

ley was all the property they had. I will just merely say that I consider the statement of claim, and the affidavits in support of it, very weak in those particulars. Since the decision in Longeway v. Mitchell, 17 Gr. 190, it has been generally accepted in this country as good law that a simple contract creditor, who has not obtained a judgment and issued execution, cannot maintain an action on his own behalf to set aside a deed, conveyance, or transfer alleged to be fraudulent under the Statute of Elizabeth, though he might possibly obtain relief by suing on behalf of himself and other creditors. See also Hepburn v. Patton, 26 Gr. 597, and Morphy v. Wilson, 27 Gr. 1.

The title of the statement of claim does not allege that the plaintiff is suing on behalf of herself and other creditors, but in the body of the claim, as before stated, she alleges that she is so suing. However, I do not know that that makes any difference. There is no allegation whatever in the statement of claim or in any affidavit used on the application, that there are other creditors than the plaintiff. The authorities to which I have referred must contemplate that in order to warrant a simple contract creditor bringing an action in the name of other creditors to set aside a fraudulent deed under the Statute of Elizabeth, there must be other creditors, because if there are no other creditors the allegation that she is so suing must be false. A plaintiff would be merely stating a false fact in order to endeavour to bring himself within the letter of the law. It is quite evident that he could not be suing on behalf of other creditors, if there were no other creditors, and therefore he must be suing on behalf of himself in that case. I do not consider it necessary to elaborate the case any further except to refer to the judgment of Richards, J.A., in Traders Bank v. Wright, 8 W. L. R. 208, in which that learned Judge, while agreeing with the reasons given by Howell, C.J.A., for dissolving the injunction, also based his judgment upon the same grounds as those upon which I base my judgment herein. The injunction order, therefore, was improvidently granted and must be dissolved. So far as the Preferential Assignments Act is concerned, it is not applicable, because the assignment does not pretend to be made to a creditor of the Walkers.

The injunction will be dissolved with costs.

YUKON TERRITORY.

MACAULAY, J. NOVEMBER 22ND, 1909.

TRIAL.

KERRUISH v. SENKLER.

Mines and Minerals — Miners' Lien Ordinance — Lien for Wages — Services as Foreman — Lien Filed too Late with Regard to Period of Service — Subsequent Services as Watchman — No Right to Lien for — Voluntary Services Enhancing Value of Mine — Service of Originating Summons.

This was a proceeding commenced by way of originating summons, under the provisions of the Miners' Lien Ordinance of the Yukon Territory, to enforce a lien for wages against the "Copper King" mineral claim, grant No. 348, situate in the White Horse mining district, Yukon Territory.

W. L. Phelps, for the plaintiff.

E. C. Senkler, defendant in person, representing as administrator the estates of W. P. Granger and J. McIntyre, deceased.

George Black, for the defendants J. P. Whitney and W. C. Pedlar.

MACAULAY, J.:—The plaintiff was the foreman for the defendant W. S. Thomas, who was operating the above mentioned claim under an agreement with his co-defendants, dated the 18th April, 1908, whereby Thomas had undertaken to work and develope the claim, with the right to purchase the same upon the fulfilment of the conditions contained in the said agreement, and, upon the evidence submitted, it is quite clear that on the 15th July, 1909, there was due and owing to the plaintiff by the defendant Thomas the sum of $1,885.30 for wages due to the plaintiff during the time he was in the employment of the defendant Thomas as foreman, and afterwards as a caretaker or watchman at the mine.

The plaintiff first entered the service of the defendant Thomas as foreman upon the "Copper King" mine on or about the 24th July, 1907, when the defendant Thomas was

working the property under a prior agreement, and the plaintiff continued in the employment of Thomas until the 15th July, 1909.

One Henry Baxter, of White Horse, was acting as general manager for the defendant Thomas in his mining operations in the Yukon Territory, having entered into his service about the 11th April, 1907. On the 3rd March, 1909, as the evidence shews, the general manager, Henry Baxter, who was then residing at White Horse in the Yukon Territory, received a telegram from the defendant W. S. Thomas from Pittsburgh, Pa., to close down all operations on the "Copper King" mine, and, accordingly, on the 4th March all operations were closed, and all the men who were working upon the mine were dismissed with the exception of the plaintiff, who continued on in the service of the defendant Thomas during the month of March, 1909, at his regular rate of wages, $250 per month and living expenses. Baxter, in his evidence, says it was necessary that some one should remain at the mine at this time, and, in his opinion, the plaintiff was the proper person to so remain and look after the interests of the company, which consisted of protecting the machinery by disconnecting pipes, gathering the tools and storing them away, and doing various other things which were material for the protection of the plant and machinery during the period the mine might be closed down.

Afterwards the defendant Kerruish remained at the mine during the months of April, May, June, and until the 15th July, at half pay, or $125 per month, under a new agreement made with the defendant Thomas, which agreement or proposal is set out in a letter from Thomas to Kerruish, and which proposal was accepted by Kerruish. The letter reads as follows: "Pittsburg, Pa., 3/9/09 (meaning the 9th day of March, 1909, as was explained by the evidence). Thomas Kerruish, Copper King, Y.T. My dear Sir: Owing to the low prices prevailing for copper and which will continue for this year at least, and the high rates of freight, even if we had plenty of ore it could not be mined at a profit. I am, therefore, reluctantly compelled to ask you to shut down all work, and for yourself, if you would like to stay on with me, to go on half pay and remain on the property looking after such things as may be necessary, until we can either do something ourselves in the way of taking care of all the ore, both high and low grade, or have some other

party build a smelter. If this arrangement is satisfactory, let Baxter know, and oblige, yours truly, W. S. Thomas."

The plaintiff accordingly, on receipt of this letter, interviewed Mr. Baxter and entered into the arrangement to remain at the mine as above stated. The plaintiff says that from the 1st April until the 15th July he did considerable prospecting work upon the mine, which work was of such a nature that it would have materially benefited the defendant Thomas when operations would be resumed. On the 15th July, 1909, however, the defendant Thomas allowed his option on the mine to lapse, and on the 16th July the plaintiff filed this lien.

Section 3 of the Miners' Lien Ordinance provides, amongst other things, that "any person who performs any work or service upon or in respect to any placer or quartz mining claim shall, by virtue thereof, have a lien for the price of such work or services upon the said mining claim with the appurtenances thereto, the minerals or ore produced therefrom, the lands occupied thereby," etc., and it is contended by the plaintiff that his services were of such a nature that he is entitled to have his lien enforced against the above mentioned property in accordance with the provisions of the Ordinance.

Undoubtedly, he would be entitled to a lien for the wages due and owing to him up to and inclusive of the month of March, 1909, had his lien been filed within 30 days, as provided by sec. 9 of the Ordinance, or within 30 days after the 30th April, 1909. The question, however, for me to decide is whether the work or services performed by him from the 1st April, 1909, to the 15th July, 1909, are of such a nature as would entitle him to a lien upon this mining property in question.

It has been held in Davis v. Crown Point Mining Co., 3 O. L. R. 69, and in other cases, that a cook who does the cooking for the men engaged in mining upon a mining location is not entitled to a lien. It has also been held in the case of Nash v. Southwick, an American case, noted in 27 Cyc. 82, that a person employed to act as a clerk and make himself generally useful, is not entitled to a lien. The reasons given are that the object of the lien law was to provide some security to persons who by their efforts and labour upon the property enhanced the value of it. Truly, the plaintiff says that during the period between the 1st April

and the 15th July, 1909, he did work upon the mine of such a nature that would enhance the value of it if operations were resumed. However, any work that he did between the dates mentioned was of a voluntary nature, and not work which he was expected to do under the provisions of his new agreement of hiring. Thomas in his letter says: "If you care to stay on with me to go on half pay and remain on the property looking after such things as may be necessary until we can either do something ourselves in the way of taking care of all the ore, both high and low grade, or have some other party build a smelter." The question is, was the work Kerruish was expected to perform under those instructions of such a nature as to entitle him to a lien upon this property?

The work was actually closed down, and he had nothing to do but to remain on the property, practically in the capacity of a watchman. Under those circumstances, and in view of the decisions upon the meaning of the kind of work performed which would entitle the workman to a lien, I am forced to the conclusion that the work required to be done by the plaintiff upon this mine between the 1st April and the 15th July, 1909, was not of such a nature as would entitle him to a lien under the provisions of the Miners' Lien Ordinance, and, not having filed his lien within 30 days after the 30th April, 1909, he is too late now to enforce it under the provisions of sec. 9 of the Ordinance.

These proceedings were commenced before the amendment to the Ordinances (permitting the Judge to give a personal judgment for the amount due) came into force, and consequently I do not feel warranted in giving judgment against the defendant Thomas for the amount undoubtedly due to the plaintiff by him for wages, and, in any event, in case I did attempt to so order, the question of service upon the defendant Thomas would become very material.

Many other questions arose in this case which are not necessary for me now to consider, owing to the view I have taken upon the merits. Much argument was made, however, upon the right to serve and the manner of serving an originating summons under this Ordinance. After having carefully considered this point, I may say that I am clearly of opinion that sec. 14 amply provides for the means of service. It is a statutory provision, and consequently in no way con-

flicts with the authorities which were cited to me upon the point.

In accordance with the conclusions I have arrived at, this action, or proceeding, will be dismissed with costs.

MANITOBA.

NOVEMBER 29TH, 1909.

COURT OF APPEAL.

SCOTT v. CANADIAN PACIFIC R. W. CO.

Railway—Injury to Servant—Brakesman—Uncoupling Cars —Railway Act, R. S. C. 1906 ch. 37, sec. 264—Want of Proper Appliances—Evidence for Jury—Negligence.

The plaintiff was a brakesman in the employ of the defendants. In the discharge of his duties as such he attempted to uncouple a caboose from the tender of a locomotive, which was slowly backing. There was, upon the rear of the tender, a lever for the purpose of enabling uncoupling to be done without requiring the person who was doing the uncoupling to go between the ends of the tender and the car. There was no such lever upon the ends of the caboose, or car. The plaintiff attempted to uncouple by means of the lever, but the pin at the end of the coupling next to the tender held fast, and he was unable to lift it. He then reached in between the tender and the caboose, and endeavoured to pull the pin at the end of the coupling next to the caboose. In doing so he stumbled, his clothing was caught, and he was dragged under the wheels of the tender, and suffered the loss of an arm.

The action was for damages for his injuries, and was first tried before PHIPPEN, J.A., who nonsuited the plaintiff. The Court of Appeal set aside the nonsuit and directed a new trial: 11 W. L. R. 120.

At the second trial the jury found for the plaintiff and the defendants appealed, asking for a new trial.

W. H. Curle, for the defendants.

M. G. Macneil, for the plaintiff.

The judgment of the Court (HOWELL, C.J.A., RICHARDS and PERDUE, JJ.A.), was delivered by

RICHARDS, J.A.:—Section 264 of the Railway Act, R. S. C. 1906 ch. 37, reads as follows: "264. Every company shall provide and cause to be used on all trains modern and efficient apparatus, appliances and means . . . (c) to securely couple and connect the cars composing the train, and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars."

It appears from the evidence that the couplings in use are such that uncoupling may be done by withdrawing either of two pins, which are at the different ends of the coupling—that is to say, in this case one was next to the tender and the other next to the caboose.

It also appears from the evidence that such pins can nearly always be lifted by the lever, when levers are provided; but, apparently, in some instances the lever will not work, and, in such cases, unless there is a second lever which can be tried by the brakesman, he fails to get the benefit, which was intended by the Act, of apparatus which can be uncoupled without the necessity of men going in between the ends of the cars.

There is no evidence that it would be a matter of serious cost to the defendants to have levers at both sides of each end of every car. I think it is apparent that the cost of so equipping all of their cars would be comparatively slight.

In the present case, if such a lever had been at the caboose end of the coupling, the plaintiff, on finding that the lever on the tender did not work, would have been able to use the lever on the caboose. As these levers, apparently, only refuse to work in comparatively few instances, the chances are very greatly in favour of the plaintiff having escaped injury in case of such lever having been upon the caboose.

Under the above circumstances, there was evidence to go to the jury, and, they having found for the plaintiff, I do not think their verdict should be interfered with.

It is suggested that, as the pin at the caboose end of the coupling was fastened by a chain to a rail on the platform of the caboose, the plaintiff could have got upon the platform

of the caboose and pulled the pin from there without incurring any risk to himself. That contention, I think, is met by the fact that it was necessary for the plaintiff, when pulling the pin, to give a signal to the engine-driver, and by the fact that the engine in use was not an ordinary shunting engine, but one the tender of which was so high that the plaintiff could not, if he had gone on the platform, have given the signal at the moment at which it would have been of use.

I would dismiss the appeal with costs.

MANITOBA.

NOVEMBER 29TH, 1909.

COURT OF APPEAL.

PATERSON v. HOUGHTON.

Vendor and Purchaser—Option of Purchase of Land—Condition as to Time — Waiver — Continuance of Option — Cancellation—Notice—Specific Performance Refused.

The plaintiff (as vendor), by an agreement in writing dated the 8th May, 1906, agreed to sell to the defendant (as purchaser) certain lands and premises in the city of Winnipeg for the sum of $5,500, payable as follows: the sum of $3,500 by the purchaser assuming a mortgage on the premises for that amount; the sum of $1,000 in cash; the sum of $500 on the 1st December, 1906; and the balance of $500 on the 1st December, 1907. The agreement contained a clause making time of the essence of the contract, and, amongst other provisions, set out the following (which could be termed the sub-agreement):—

"And as a further consideration for the within transaction the purchaser hereby covenants and agrees to and with the said vendor to give the said vendor a transfer under the provisions of the Real Property Act, free from all incumbrances, of that land situate in the province of Manitoba and being composed of the south-west quarter and the south half of the north-west quarter of section 1 in township 9 in range 8 west of the principle meridian, on the vendor first paying the said purchaser the sum of $500 and interest thereon at 6 per cent. from the date hereof, such payment to be

made on or before the 1st December, 1906, and if not then made, the said purchaser shall be at liberty to cancel this agreement to convey said land."

This action was brought by the plaintiff for the specific performance of the sub-agreement above set forth. It was alleged in the statement of claim that it was verbally agreed between the paintiff and the defendant that the payment due by the defendant on the Winnipeg property in December, 1906, should be applied on the purchase price of the farm property in the sub-agreement set forth. It was further alleged that on the 25th February, 1907, the plaintiff tendered the amount with interest due under the agreement, but the defendant refused to accept the same, and that at no time up to and including the day of the tender did the defendant cancel the sub-agreement.

The defendant set out in his statement of defence the terms of the sub-agreement, and stated that the plaintiff did not pay the sum of $500 and interest on the 1st December, 1906, wherefore he, the defendant, cancelled the agreement; and further alleged that the plaintiff, having made default, was not entitled to relief.

A further defence was set up, that the plaintiff was erecting a house on the Winnipeg land, and that it was verbally agreed that the construction thereof should be completed by the plaintiff, on which the plaintiff made default, whereby the defendant suffered damage.

The action was tried by MATHERS, J., who dismissed it: 11 W. L. R. 118.

The plaintiff appealed, and the appeal was heard by HOWELL, C.J.A., RICHARDS, PERDUE, and CAMERON, JJ.A.

J. E. O'Connor and T. L. Hartley, for the plaintiff.

M. G. Macneil, for the defendant.

CAMERON, J.A.:—The trial Judge found that the plaintiff did not agree to complete the house in question, but that the defendant agreed to take it as it was at the time of the agreement. This finding disposes of all questions involving this point raised on the pleadings and the evidence. The trial Judge found that there had been no cancellation of the sub-agreement by the defendant up to the time of the tender on the 24th February, 1907.

It was argued by counsel for the appellant that the defendant had waived the condition as to time by the correspondence, by his conduct, and by entering into an agreement to set off the two $500 payments due on the 1st December, 1906. It seems to me that this view cannot be supported. In Friary Holroyd v. Singleton, [1899] 2 Ch. 361, it was held on appeal that the correspondence in that case clearly established a waiver of notice of intention to exercise an option to purchase required by a lease. I can, however, draw no such inference from the correspondence before us in this case. And I cannot see how there can, by extrinsic evidence of a vague and uncertain character, be incorporated in the written agreement a further agreement that the two payments of $500 should be set off the one against the other. Nor can I discover anything in Houghton's attitude or conduct that could, with any reasonableness, be held to amount to a waiver of the plaintiff's obligations under the contract.

I agree with the learned trial Judge that this sub-agreement comes within the class of contracts referred to in Dibbins v. Dibbins, [1896] 2 Ch. 348. In that case articles of partnership provided that, on the death of either partner, the survivor should have the option of purchasing the deceased partner's share, upon giving notice in writing within a limited period. Owing to the surviving partner being of unsound mind, proper notice was not given within the time fixed. It was held by Chitty, J., that: "The doctrine of equity that time is not of the essence of the contract is not one of universal application, and it is settled with reference to options of this kind that there is no difference as to time between the rule of equity and the rule of common law; in other words, in exercising an option of this nature, where time is limited, the option must be exercised (if at all) within the time for which it is expressed to be given, both at law and in equity."

An option is defined to be a right acquired by contract to accept or reject a present offer within a limited, or, it may be, a reasonable, time in the future. In this case the exercise of the right is expressly made dependent "on the vendor first paying the said purchaser the sum of $500 and interest . . . such payment to be made on or before the 1st December, 1906." This sub-agreement gave the plaintiff no rights in the property. The right acquired by the plaintiff was that of calling upon the defendant, within the time

limited and upon the performance of the condition prescribed, for a transfer under the Real Property Act of the property set forth. Such a contract or option must be accepted in the terms in which it is made, and, where the exercise of the option is made dependent on the performance of acts which are by express agreement conditions precedent to such exercise, they must be strictly performed. Where time is specified, attempts to exercise the option after the lapse of the time prescribed, on the ground that, in equity, time is not of the essence of the contract, have been uniformly met with the answer that where the parties have seen fit to regard time as an essential element, the Courts must likewise so regard it: Am. & Eng. Encyc. of Law, vol. 21, p. 931; Williams on Vendors and Purchasers, p. 468, note.

All precedent conditions must be fulfilled by the purchaser before the contract for sale binds the vendor. Moreover, time is of the essence of such contracts; hence, if the conditions are not complied with by the date fixed, the option is lost: Dart, p. 272. A condition requiring payment of the purchase money on a named day must be complied with, even if no title be shewn. In Brooke v. Garrod, 2 DeG. & J. 67, Lord Chancellor Cranworth said: "If a contract be that on payment of a sum of £1,000 at or before a specified day, a certain act shall be done on my part, I am at a loss to see why I can be properly called upon to do the act, if the money be not paid on that day."

In Lord Ranelagh v. Melton, 2 Dr. & Sm. 282, it was held by Vice-Chancellor Kindersley that where there is a contract between the owner of land and another person, that if such a person shall do a specified act, then he, the owner, will convey the land to him in fee, the relation of vendor and purchaser does not exist between the parties unless and until the act has been done as specified. It is the case of a condition on the performance of which the party performing it is entitled to a certain benefit. Therefore, if a day be fixed for the performance, the lapse of that day without its being performed, prevents him from claiming the benefit: time is of the essence, and, the money not being paid at the time fixed, the right to purchase is lost.

In Weston v. Collins, 11 Jur. N. S. 190, the lessor covenanted with the lessee, that, if the latter, being desirous of purchasing the fee, should give 6 months' notice of his in-

tention and pay £2,000 and any arrears of rent, he, the lessor, would convey the premises free of incumbrances; the Lord Chancellor held it clear that the delivery of the notice and the payment of the purchase money were conditions precedent before any contract arose binding the lessor. "It is certainly true that the plaintiff, according to this construction of the covenant, will be under the necessity of paying the whole of the purchase money before he can ascertain whether it is or is not in the power of the lessor to make a good conveyance of the fee simple. If a good conveyance cannot be made, the money will be recoverable. It was for the lessee to determine whether he would incur the risk at the time when he gave the notice of his intention to purchase. When the lessee has paid his purchase money in the manner prescribed, the obligation of the lessor arises."

In Waterman v. Banks, 114 U. S. 394, the writing in question gave one party an option to demand a conveyance within a prescribed time. It was held that time was there made the essence of the agreement. The demand for a conveyance within a given time was made by the parties a condition precedent to the acquisition of an interest in the property. The other party did not agree to convey, except upon the performance of that condition precedent. The condition being lawful, it was held that the Court is not competent to dispense with its performance.

If in this case it appeared that there had been a further agreement for the extension of the time within which the payment of $500 and interest should be made, there being no consideration for such further agreement, it would be nudum pactum and void: Ide v. Leiser, 24 Pac. Repr. 695. If a contract for an option based upon a sufficient consideration is extended after the time limited, without any consideration, such extension is not an option, but is a continuous offer, and may be withdrawn at any time before acceptance. In Dickinson v. Dodds, 2 Ch. D. 463, it was held that there need not be any formal retractation of an option by the giver thereof. It is sufficient if the person to whom the offer was made has knowledge that the person has done some act inconsistent with the continuance of the offer. And in this case the correspondence before tender shews an attitude on Houghton's part inconsistent with the continuance of the offer. But, in point of fact, I cannot find in the evidence or in the correspondence any support for the contention that

there was a further contract extending, for a fixed or an indefinite time, the period prescribed for the payment of the $500 and interest.

In my opinion, the words "and if (such payment be) not then made the said purchaser shall be at liberty to cancel this agreement to convey said land" neither add to nor restrict the words preceding them. The "purchaser" (the defendant) was at liberty to enter into a new agreement with the "vendor" after the lapse of that in question, or he could decline to do so. His powers are in no way diminished or enlarged by the use of the words referred to. Even the duty of giving notice is not imposed on him thereby. To hold that those words have the effect of continuing the offer or option until the power of cancellation has been exercised, would seem to me to be adding a new term to the contract, which is not within the jurisdiction of this Court.

Is there any imperative reason why we should place a meaning upon these words other than that which they plainly bear? An attempt to give to these words a meaning wider than that which they carry in the context obviously must result in the importing into the sub-agreement of a term which is not now there. It is sought to add in this way to the sub-agreement another term in substance in these words: "The option hereby granted shall, nevertheless, continue after the 1st December, 1906, until such power of cancellation is exercised." I confess my inability to admit this construction. I consider it plain beyond question that the 1st December, 1906, was fixed and expressed by the deliberate intent of the parties as the date within which, and not later than which, the option must be exercised. To put any other interpretation upon the sub-agreement in respect of these words is, to my mind, adding to the contract an entirely new term unthought of by the parties, which is surely beyond the competence of this Court.

In my opinion, the judgment appealed from must be affirmed with costs.

HOWELL, C.J.A.:—I have read the judgments prepared by my brother Judges, and the only doubt in my mind is as to the construction of the last clause of the paragraph in the agreement in controversy.

The agreement is a covenant on the part of the defendant, given for valuable consideration, to convey certain lands

to the plaintiff on the following conditions: "On the vendor (the plaintiff) first paying the said purchaser (the defendant) the sum of $500 and interest . . . such payment to be made on or before the 1st December, 1906." This condition has not been complied with, and, unless the succeeding clause extends, and was intended to extend, this right given the plaintiff, he has no remedy. The succeeding clause is as follows: "And if not then made, the said purchaser (the defendant) shall be at liberty to cancel this agreement to convey the said lands."

The parties are called in the above-quoted part of the agreement, "vendor" and "purchaser," because of their relationship as to another transaction set forth in an earlier portion of the document.

The meanings given to the word "cancel" are, amongst others, to blot out, to obliterate, to annul, to cross out, to do away with, to make lattice work, or to draw a pen across like lattice work, from which the word was originally derived. If the defendant had scored, or blotted, or smeared that portion of the document relating to this matter, he would have cancelled it, and it seems to me, if he decided not to act on it, he has cancelled it.

I think the appeal must be dismissed with costs.

PERDUE, J.A., concurred with HOWELL, C.J.A., and CAMERON, J.A.

RICHARDS, J.A.:—By an agreement dated the 8th May, 1906, between the plaintiff (therein called the vendor) and the defendant (therein called the purchaser) the plaintiff agreed to sell to the defendant certain property in the city of Winnipeg, and near the end of the said agreement the following paragraph was inserted: (as set out in the judgment of CAMERON, J.A., supra.)

Certain evidence was gone into at the trial as to how the above recited agreement, for the sale of the farm land by the defendant to the plaintiff, came to be inserted in the agreement for the sale of the city property, and to shew that it was really intended that the $500 above mentioned was not to be actually paid, but was, if the plaintiff wished to take the farm property at $500, to be set off against a payment of $500 payable on the 1st December, 1906, by the defendant to the plaintiff, on the purchase of the city property.

The agreement as to the farm property has to speak for itself, and, unless it cannot be construed without verbal evidence, such evidence, it seems to me, is inadmissible, and we must deal with the case as it appears on the face of the document.

The plaintiff, it will be seen, was not bound to avail himself of the privilege of buying this farm land; so that the above quoted provision is, in effect, merely an option to him. The plaintiff did not in fact exercise that option on or before the 1st December, 1906; and it was not till two months or so thereafter that he notified the defendant of his wish to take the farm land for the $500; and it was not till nearly 3 months after the 1st December that he tendered the money and asked for a conveyance.

The defendants contended that the option is limited to the 1st December, 1906, and that, not being then exercised, it fell through, and the plaintiff lost his right to take advantage of it.

He further contends that, before a tender was made to him, he cancelled the option.

The trial Judge found that the defendant did not cancel the option before the tender; and, as there was evidence both ways on that point, his finding should not be interfered with.

The question is one simply of construction of the above recited paragraph as to the farm land. If the words that follow the figures "1906" had not been inserted, I think there is no doubt that the defendant's contention should be upheld, that the option, not having been exercised on or before the 1st December, 1906, came to an end immediately thereafter.

To put that construction on it, however, it must be read as if the last clause had not been inserted, and I do not think we are at liberty to read it in that way if a meaning can be given to the agreement as a whole, including that clause.

The question of the last clause affecting the agreement does not seem to have been brought to the attention of the trial Judge, and he does not deal with it in his judgment. But for it I should agree with his judgment in every respect.

The agreement must, if possible, be construed so as to give effect to that last clause. A construction which would have that effect is to hold that it meant that the option was to remain open to the plaintiff, irrevocably, until the 1st

December, 1906, and, after the 1st December, 1906, until cancelled by the defendant. In other words, it would mean an option to the plaintiff, to remain open to acceptance by him until cancelled, but that such cancellation could not be exercised until after the 1st December, 1906. I see no other construction that would not treat the last clause as mere surplusage.

It is argued by the defendant that the printed clause contained in the agreement, that time is to be of its essence, made the option expire on the 1st December. I do not see that it could, in view of the above construction, and I do not see that it would be material even if the last clause were not in the agreement, as in that case the option would lapse, as of course, on the expiry of the 1st December without acceptance by the plaintiff.

A person entering, for a consideration, into an agreement to give another person a certain right until he, the person giving the right, cancels it, is bound by that agreement until he actually cancels it, unless there has been such a serious lapse of time as to shew an abandonment by both parties of the agreement. There has been no such delay in the present case.

I am of the opinion that the tender of the money, combined with the request for a transfer, was an exercise of the option, and made a binding mutual contract between the parties. The plaintiff is, in my opinion, entitled to specific performance of the agreement on payment of the amount tendered by him, without any subsequent interest.

I would allow the appeal accordingly with costs.

Appeal dismissed with costs; RICHARDS, J.A., dissenting.

MANITOBA.

NOVEMBER 29TH, 1909.

COURT OF APPEAL.

SCHAEFER v. SCHWAB.

Defamation—Libel and Slander — Privilege — Evidence of Malice or Indirect Motive—Truth or Falsity of Defamatory Words—Judge's Charge—Damages.

Action for libel and slander. The alleged libel was contained in a report made by the defendant and others to the

congregation of a church of which the plaintiff and the defendant were members, with regard to the plaintiff's transactions as treasurer of the church. The plaintiff also alleged that the defendant spoke defamatory words concerning him (the plaintiff).

The action was tried with a jury, who found a verdict for the plaintiff for $400, without apportioning the damages between the two causes of action.

The defendant appealed, asking for a new trial.

The appeal was heard by RICHARDS, PERDUE, and CAMERON, JJ.A.

W. H. Trueman, for the defendant.

C. P. Fullerton and A. H. S. Murray, for the plaintiff.

RICHARDS, J.A.:—The defendant alleged that the report was made at the request of the congregation by himself and others as auditors, and that he was therefore protected by privilege, unless the plaintiff could shew malice on the part of the defendant in the making of the report.

The defendant contends that the charge of the trial Judge was such as to lead the jury to believe that what they were trying was the truth or falsity of the report, and not the question of the defendant's bona fides in making it. He contends that, if this be so, the verdict should not be allowed to stand upon the count for libel, and that, as the damages were not apportioned, and might, in fact, have been given almost entirely by the jury in respect of the libel, he is entitled to a new trial.

The trial Judge did comment strongly upon the facts; but, upon reading the evidence, I am not prepared to say that he was not justified in so doing, as there was very considerable evidence to go to the jury to shew that facts may have been wrongly stated in the report, to the defendant's knowledge. Furthermore, after very carefully reading the charge, I cannot think that the Judge's language, however strong with regard to the facts, in any way obscured the jury's view as to the correct issue; that is, the question whether there was malice in making the report. In some 6 or 7 parts of the charge it is distinctly stated by the trial Judge to the jury that, while he is commenting on the truth or falsity of the report, the jury have only to deal with that as bearing on the question of the defendant's good faith in

making the report, and that the real question is, whether or not there was such good faith. It seems to me, therefore, that it should not be held that the trial Judge in any way misdirected the jury; particularly as there was evidence, which the jury might have believed, that the instructions to investigate and make the report were withdrawn, and that the defendant, in spite of such withdrawal, persisted in making the audit and the report.

I would dismiss the appeal with costs.

PERDUE, J.A.:—This is an action for both libel and slander. The alleged libel was contained in a report and letter set out in the statement of claim. The plaintiff was the treasurer of a church congregation, and a committee, of which the defendant was a member, had been appointed to audit his accounts. The report charged the plaintiff with being short in respect of certain sums of money received by him on behalf of the church. The letter was written by the defendant to the pastor of the congregation, and the same charge of shortage was made against the plaintiff.

The defendant set up that the report and letter were privileged, and the plaintiff then had to prove actual malice in the defendant, so as to shew that the latter was not entitled to the protection of the privilege he claimed. In order to shew malice in the defendant, a long inquiry was entered into at the trial for the purpose of shewing that the report was false, and that the defendant either knew or should have known that it was false. The inquiry was only justified for the purpose of shewing malice in answer to the defence of privilege, the truth or falsity of the alleged libel not being in issue. If the defendant could be shewn to have written and published what he knew to be false; the privilege of the occasion would not protect him. So, also, if he had the means at hand for ascertaining the truth, and, from some motive of his own, he recklessly made the statement without full or sufficient inquiry: Clarke v. Molyneux, 3 Q. B. D. 246. The question of whether the defendant had abused the privilege or not, or had acted from some wrong motive or not, is a question for the jury.

Without going into the great mass of evidence that was taken at the trial, it is sufficient to say that there was evidence from which the jury could find actual malice on the part of the defendant as against the plaintiff. The manner in which

the audit was made, the statements embodied in it, the reiteration in the letter of the shortage alleged in the audit, the dissension in the congregation, and the actions of the defendant and his supporters in regard to the plaintiff, all supply material upon which a finding of actual malice by a jury could be supported.

The main objection to the trial Judge's charge was that he had misled the jury as to the issue to be tried, and had led them to understand that they were trying the truth or falsity of the report, instead of the issues actually upon the record. The question of the falsity of the report came up, in the way I have already indicated, for the purpose of proving malice, and to shew that the defendant was not, for that reason, entitled to the protection of the privilege he claimed. That the evidence was allowed in for that purpose only, and that the falsity of the report was only to be considered as an element in the consideration of the question of malice, was distinctly pointed out to the jury. The charge is to be considered as a whole, and, so considering it, I cannot say that it was misleading.

The other objection strongly urged against the charge was that references were made to the plaintiff "that were friendly to him and calculated to secure for him the goodwill of the jury," while the references to the defendant "were uncomplimentary and prejudiced him in the regard of the jury."

In the strain and pressure of a long trial it often happens that a Judge makes use of expressions in delivering his charge which he would willingly modify, or altogether expunge, if he had an opportunity of revising and reconsidering it. The duty of an appellate Court in such a case is to inquire whether, by using the expressions complained of, a substantial wrong or miscarriage of justice had been occasioned in the trial. After considering the evidence and the charge, and in view of the very moderate amount of the damages, I cannot come to the conclusion that there has been any miscarriage of justice occasioned by the use of the expressions complained of.

The slander which it is alleged the defendant uttered concerning the plaintiff was proven, and the defendant utterly failed to shew any defence in regard to it. The amount of the verdict, $400, would have been justified and would have been reasonable in respect of either the libel or the slander.

I think the appeal should be dismissed with costs.

CAMERON, J.A.:—The plaintiff had been for several years trustee and from 1905 to 1908 treasurer of the German Evangelical Lutheran Holy Trinity congregation in the city of Winnipeg. A committee was appointed, on the 9th February, 1908, by the congregation, composed of Magnusson, Ruppenthal, and Schlodofsky, to audit his accounts of 1907. A deficit was shewn on their report of $90. This report was presented to the congregation on the 21st January, 1908, and adopted. Magnusson made a change in the report altering the deficit from $90 to $6.45. Against this a protest was made at the meeting by other members of the committee. There was a meeting of the church board on the 3rd February, when the defendant demanded a re-audit. At a meeting of the congregation held on the 9th February, 1908, another committee was appointed, which included Schlodofsky, Ruppenthal, Tesch, and the defendant. Magnusson was also on the committee as a representative of the treasurer. Meetings were held and a report was prepared, dated the 10th March, 1908, and subsequently presented with an accompanying letter. These are set out in the statement of claim and form the basis of the action. There is also an allegation that on the 31st March, 1908, the defendant uttered certain defamatory words.

The action was tried before the Chief Justice at the spring assize of 1909, when, after a 4 days' trial, the jury brought in a verdict for the plaintiff, with $400 damages.

A motion is now made to set aside this verdict and enter a verdict for the defendant, or for a new trial, upon 22 grounds, which mainly consist in objections to the charge to the jury of the learned Chief Justice. It having been conceded at the trial that the communications alleged were privileged, much of the evidence was directed to the establishment of malice on the part of the defendant.

The report of the first auditing committee had been adopted by the congregation on the 21st January, 1908. There was also a resolution of the congregation adopted at a regularly called meeting held on the 17th February, that there should be no further audit, and that the first report be accepted as final, and of this there is evidence that the defendant was aware, as appears by his own evidence and by the cross-examination of Ulrich. There appears no question

that the audits of 1905 and 1906 were regularly made and adopted, and that as to these years the only matter in dispute related to some outstanding cheques. It was alleged and urged that the second committee had no authority to go back of the accounts of 1907, and that the fact of its so doing was evidence of an ulterior motive. There was no congregational resolution to audit the 3 years, and apparently Dilk was the only member of the congregation who asked for it, at the meeting of the 9th February (when the second auditing committee was appointed); but even as to this the evidence is not clear.

In the report the following items are of importance and form the real basis of the statements complained of in this action:—

31 March, 1905.—Lent collection not entered in book	$ 5 30
30 April, 1905.—Sunday collection not entered in book	26 94
3 Dec., 1905.—Sunday collection not entered in book	30 00
17 Dec., 1905.—Sunday collection not entered in book	30 00
Liable to the congregation for the overdraft of Feb. 7, 1906	4 45
And the overdraft of 31 May, 1906	14 35
In the month of December, 1906, $5 of contributions are wanting in cash book	5 00
On 17 Dec., 1907, Schlodofsky paid the Revd. Mr. Henning $5 as contribution, not entered	5 00

Then follows the summary:

Treasurer is short with	$132 46

In the letter signed by Schwab, Schlodofsky, and Ruppenthal, which accompanied the report, appears the statement: "As is to be seen from the report, the treasurer is short with $132.40, and the committee insists on the treasurer repaying the money which is wanted, and make this known at the next congregational meeting called for that purpose." The innuendo charged with reference to the report and the letter is that the plaintiff had converted to his own use the sum of $132.46.

It is further alleged that on the 31st March, 1908, the defendant spoke of the plaintiff as follows: "I cannot shew him the book, because he has falsified it, and much more he has defrauded the congregation." In the statement of defence no justification was pleaded.

With reference to the first item of $5.30, it is clear that that had been taken into consideration in the previous audit. Moreover, the entry of the amount distinctly appears in the cash book at p. 2, though not carried forward into the totals. The second item of $26.94 had also been taken into consideration by the auditors first appointed. Referring to this last mentioned item the plaintiff gave the following evidence:—

"Q. Therefore that is not a correct statement of your April receipts? A. No, but that is shewn there, and I did the best I could, as I am not a book-keeper.

"Q. In giving your statement of your Sunday collections it is included, but in arriving at your receipts it is not included? A. No."

And in dealing with other items upon which the serious charges made in the report and letter were based, it appears that they are now, and were at the time, in like manner readily susceptible of explanation. The very figures upon which charges of wrongdoing were founded are set out in the books, a fact which, to the minds of an intelligent jury, would surely go a long way to negative any inference of guilt on the plaintiff's part that could be reasonably drawn. And, while it is perfectly correct to say that the accuracy or inaccuracy of the report is not the issue in this case, nevertheless, it is also correct to state that the accuracy or inaccuracy of the report, together with the facts behind the report and the circumstances surrounding it, are of material importance in determining the true issue between the parties, and are therefore legitimate and proper subjects of comment before a jury.

On the whole, it seems to me that the Chief Justice had warrant in the evidence for the manner in which he placed the subject of the report before the jury; that he did not make its accuracy or inaccuracy the issue; and that he did not in reality press that view upon the jury.

As to the objection that there was misdirection in his references to the authority and conduct of the defendant in examining the accounts for years other than 1907, it

would appear to me that he distinctly left it to the jury to say whether the 3 years' investigation was undertaken honestly or from some ulterior motive. "Now, gentlemen," the Chief Justice said, "why did they go over the 3 years? That is the first fact for you to consider. Why did they go over the 3 years' books? Were they instructed to do it, or was it for some ulterior motive of the defendant Schwab? Because he is the man we have to consider. . . . Now, why did they go into those previous years? That is a question for you and not for me. You are to judge that." And this is repeated, in effect, several times. "Why did they go into it (the account for 1905)? That is a question for you to consider. Did the defendant do that for the good of his church or did he do it for some oblique purpose? Did he have some other object in view? If he had some other object in view, instead of auditing, you may take it that was malice."

As to his authority to audit the 3 years of the plaintiff's treasurership, Schwab himself says in his evidence:—

"Q. You said it was said at the congregational meeting to go through the whole book. Who said that? A. As far as I can remember, Dilk said so. I could not swear who said it, but it was some one there."

And as to Schwab's knowledge that the congregation had on the 17th February passed the resolution deciding that the previous audit would be accepted, and that they would have nothing to do with any further audit, he stated in his evidence:—

"Q. If you did not hear it the same night, you heard it within a day or two? A. Yes.

"Q. And in spite of that resolution you kept right on auditing those books for days and days? A. Yes."

In the light of the evidence, I cannot see that the Chief Justice's comments were unwarranted, unjustified, or liable unduly or improperly to influence the jury.

The learned Chief Justice examined in detail the report, and to this examination exception is taken as tending to mislead the jury. But he concludes his analysis by stating: "It is not a question of whether the church was defrauded of that money or not. It is a question of whether this statement is correct or not; the question is, in auditing that, did Schwab act honestly?" Surely an intelligent jury could not and would not gather from this that on the accuracy or error

of the report depended the defendant's liability. The weight of the charge appears to me to be directed distinctly to the subject of motive.

The items above referred to were extensively discussed by counsel, and I need not dwell upon them at length. The plaintiff was not a book-keeper, and his methods may have been crude. The books and accounts as analysed by the Chief Justice, and the surrounding facts and circumstances. bear out his remarks to the jury. For instance, he said: "Now, gentlemen, there it is, they say in their report in the month of December, 1906, $5 of contributions are wanting entered in its right place, but not carried into the totals. in the cash book. Now, literally, that is not true. It is entered in its right place, but not carried into the totals." On perusing the charge with reference to the objections based on the items mentioned in the reports, and particularly dwelt upon in the argument, I cannot bring myself to believe that the jury could have been thereby misled. It is very clear that, if the plaintiff was defrauding the church, he was careful to make entries in his official book by which his wrong-doing could be traced. The inference is readily drawn that the neglect of the plaintiff to carry out the entries fully was due to an honest oversight, and the jury may well have thought that Schwab's action ignoring this obvious view was due not to his desire to make an impartial audit but to some other motive.

Nor can I see anything objectionable in the comments by the Chief Justice upon the leading position taken by the defendant, an architect and educated man, on the auditing committee, upon the personal relations between the parties, the withholding of the books, the letter accompanying the report, or upon any of the other grounds of objection strenuously urged by Mr. Trueman. The real and governing objection is that to which I have already alluded, viz., that the learned Chief Justice kept before the minds of the jury the fact that the plaintiff was right in his accounts and the defendant wrong in the report which he and the other auditors signed, that this was the issue between the parties, and that the charge to the jury is so saturated with this idea that the minds of the jurors were thereby improperly influenced. After full argument by counsel, upon a careful perusal of the charge and of the portions of the evidence to which we were referred, I am unable to adopt this view. The charge must

be read and considered as a whole, and not in the light of isolated passages, and the true issues were repeatedly and pointedly presented to the jury. In my judgment, there has been no transgression of the rule laid down in Bray v. Ford, [1896] A.C. 44, that every party to a trial by jury has a legal and constitutional right to have the case which he has made fairly submitted to the consideration of that tribunal. And I cannot convince myself that there has been occasioned in this action by the charge of the Chief Justice such a substantial wrong or miscarriage as is within the contemplation of Rule 660 of the King's Bench Act.

The verdict is moderate in amount, and I see no sound reason for disturbing it so far as the action of libel is concerned. It might well have been rendered in respect of the spoken words complained of without reference to the report and letter. But there is no occasion to consider separately the two causes of action involved.

In my opinion, the appeal must be dismissed with costs.

MANITOBA.

NOVEMBER 29TH, 1909.

COURT OF APPEAL.

ROYCE v. MUNICIPALITY OF MACDONALD.

Assessment and Taxes—Tax Sale—Lapse of 10 Years from Making of Levy—Real Property Limitation Act, secs. 11, 24 — Application to "Proceeding" to Sell for Taxes — Assessment Act, sec. 40—Lien for Taxes—Enforcement.

The plaintiff Royce was the owner, by purchase from one Laidlaw, in 1905, of certain lands, subject to a mortgage to the plaintiffs the North British Canadian Investment Company Limited, executed on the 25th June, 1904.

The admissions on which the case was tried were in part as follows:—

"3. The said lands are situate within the school district of Donore, a district duly formed by the defendants pursuant to the provisions of the Municipal Act and the Public

Schools Act, and lying within the boundaries of the rural municipality of Macdonald.

"4. Pursuant to the statutes in that behalf, the defendants directed their proper officials to advertise and sell the said lands for alleged arrears of taxes, being the rate referred to in paragraph 6 hereof, which the said officials proceeded to do, and the said lands were advertised for sale on the 14th September, 1907.

"5. That on or about the 21st February, 1896, the Canada Permanent Loan and Savings Company recovered a judgment in the Court of King's Bench against the said school district of Donore No. 118, for the sum of $1,642.67, together with the taxed costs amounting to the sum of $160.67.

"6. That on or about the 10th July, 1896, the said Canada Permanent Loan and Savings Company caused to be issued a writ of fieri facias de bonis on the said judgment, against the school district of Donore No. 118, directed to the sheriff of the eastern judicial district, commanding the said sheriff to make the amount of the said judgment, together with interest and costs.

"7. The saim amount with interest and costs not being paid, the said sheriff examined the assessment roll of the defendants in which the said school district is situate, and struck a rate on the dollar on the assessable lands in said school district of Donore No. 118 sufficient to cover the amount due upon such execution, and the said sheriff issued a precept under his hand and seal of office, directed to the treasurer of the municipality, commanding the said treasurer to levy or cause to be levied such rate at the time and in the manner by law required in respect of the general municipal rates, and all proper steps were taken to collect the same, under the provisions of the Municipal Act and Public Schools Act.

"8. The said judgment, execution, levy, and proceedings (other than the sale proceedings referred to in paragraph 4 hereof), were recovered, issued, made, and taken respectively at a time more than 10 years prior to the said sale proceedings.

"9. These admissions are made for the purpose of this application only.

"10. This is an action brought by the plaintiffs to restrain the sale by the defendants of the said lands, and for a de-

claration that the said levy or said rate does not form a lien or charge upon the said lands."

The action was tried before MACDONALD, J., who dismissed it with costs: 11 W. L. R. 277.

The plaintiffs appealed, and the appeal was heard by HOWELL, C.J.A., RICHARDS, PERDUE, and CAMERON, JJ.A.

A. J. Andrews, K.C., and F. M. Burbidge, for the plaintiffs.

A. Haggart, K.C., for the defendants.

PERDUE, J.A.:—This is an action to restrain the defendant municipality from selling the plaintiffs' land in order to enforce the levy of a rate to satisfy a judgment.

It was admitted that the judgment, execution thereon, and levy were recovered, issued, and made respectively at a time more than 10 years prior to the sale proceedings in question. The point to be decided was whether the Real Property Limitation Act, R. S. M. 1902 ch. 100, applied, and constituted a bar to the defendants' proceedings.

By sec. 24 of the Real Property Limitation Act, it is provided as follows: "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged or payable out of any land or rent at law or in equity, or any legacy, but within 10 years next after the present right to receive the same accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon has been paid," &c.

It is argued that the words "or other proceeding" are controlled by the words that precede them, and refer only to something in the nature of or connected with an action or suit.

"An Act of Parliament is to be construed according to the ordinary meaning of the words in the English language, as applied to the subject matter, unless there is some very strong ground derived from the context or reason why it should not be so construed:" per Lord Esher, in Hornsey Local Board v. Monarch Investment Society, 24 Q. B. D. at p. 5. Further, if a statute contains language which is cap-

able of being construed in its popular sense, it is to be construed it its popular sense, that is to say, the sense which people conversant with the subject matter with which the statute is dealing would attribute to it: Grenfell v. Inland Revenue Commissioner, 1 Ex. D. 242; Craies' Statute Law, 4th ed., p. 153: Maxwell on Statutes, 4th ed. p. 80. The word "proceeding" has a very wide meaning, and includes steps or measures which are not in any way connected with actions or suits. For instance, the expression "proceedings under power of sale" was in very common use both by lawyers and the general public when the Statute of Limitations was passed. If we give the narrower construction to the word and confine its meaning to proceedings in the nature of actions or suits, then the section would not apply to what might be done under a power of sale in a mortgage, notwithstanding that the statutory period had elapsed. In Neil v. Almond, 29 O. R. 63, Ferguson, J., held that an attempt to sell under a fi. fa. lands in Ontario was a "proceeding" within the meaning of the corresponding clause in the Ontario statute, and that the clause applied to such a proceeding. See also Smith v. Brown, 20 O. R. 165; Re Stinson's Estate, 29 L. R. Ir. 490.

It was also urged that the words "at law or in equity" apply to and qualify the words "shall be brought." Under this construction the meaning of the word "proceeding" would be confined to proceedings at law or in equity.

In construing the section we must give to the words used their usual grammatical construction. If the words "at law or in equity" are construed as qualifying "shall be brought," then we shall have the words "or any legacy" hung up alone without being either the subject or objective of any verb. I think it is manifest that the words "at law or in equity" qualify the words immediately preceding them, that is to say, "or otherwise charged upon or payable out of any land or rent."

The prohibition contained in the clause must, therefore, apply to proceedings to recover money charged upon or payable out of land, even though such proceedings are not in the nature of an action or suit.

The statute applies to a public corporation such as a municipality: Hornsey Local Board v. Monarch Investment Society, 24 Q. B. D. 1.

It was further argued that the rate sought to be enforced by the defendant was not a lien or charge upon land under the statute. It is plain that, if the judgment itself is barred by the statute, then all proceedings to enforce it must fall with it. It is well settled that the Real Property Limitation Act applies to a judgment whether charged upon land or not, and that no proceedings can be taken to enforce it after the lapse of the statutory period: Jay v. Johnstone, [1893] 1 Q. B. 25, affirmed in the Court of Appeal in same volume, p. 189: Blanchard v. Muir, 13 Man. L. R. 8; McKenzie v. Fletcher, 11 Man. L. R. 544. Upon the admitted facts the judgment in question in this suit was, on the authority of the above cases, clearly barred by the statute.

I think the appeal should be allowed and a judgment entered restraining the defendant from selling the land in question for the purpose of enforcing the levy or rate. The plaintiffs should also be entitled to a declaration that neither the levy nor rate forms a charge upon the land. The plaintiffs should be entitled to the costs of the action and of this appeal.

CAMERON, J.A.:—It appears well settled that the Statutes of Limitations apply to municipalities. Hornsey Local Board v. Monarch Investment Building Society, 24 Q. B. D. 1, was an action brought in 1888 for a declaration that paying expenses incurred by a local board, completed in 1875, but not apportioned until 1885, became a charge on the premises, and for a sale thereof. These expenses were, by the Local Government Act, 1858, made a charge upon the premises in respect of which they were incurred. It was held by the Court of Appeal (affirming the judgment of the Queen's Bench Division) that such expenses became a charge upon the completion of the works, and that the period of limitation began to run from the date of the completion under the Real Property Limitation Act, 1874, and not from the date of the apportionment. It was not suggested on the argument or in the judgments that the statute did not apply.

"The statute runs for or against towns and cities and also for or against counties in the same manner as it does for or against individuals": Wood on Limitations, p. 118. Gibson v. Chouteau, 13 Wall (U. S.) 92, and Boone v. Burlington, 139 U. S. 684, are amongst the authorities

quoted by the author. In Metropolitan R. Co. v. District of Columbia, 132 U. S. 1, it was held that the District of Columbia is a municipal corporation subject to the ordinary rules governing the law of procedure between private persons, and that the Maryland Statute of Limitations of 1715 (substantially that of 21 Jac. I.) in force in the district, embraces municipal corporations. "There is no apparent reason why they (municipal corporations) should not be included in the statute. It is conceded that private corporations are included. On what ground, then, can municipal corporations be excluded? Not on the ground that they are not 'persons,' for that would exclude private corporations. They are, therefore, within the terms of the law. Are they not also within the spirit and reason of the law? They are certainly within the reason of the preamble. It is just as much for the public interest and tranquillity that municipal corporations should be limited in the time of bringing suits as that individuals or private corporations should be. The reason stated in the preamble for the passage of the law applies to all; and, moreover, it shews that the objects of the law are beneficent ones, and, therefore, that it should be liberally construed:" per Mr. Justice Bradley, delivering the opinion of the Court, at pp. 10 and 11; and at p. 12 he approves the statement in Dillon on Municipal Corporations that the statutes of limitation, "at least as respects all real and personal actions, run in favour of and against these corporations in the same manner and to the same extent as against natural persons."

The proceedings in question are taken pursuant to sec. 263 of the Public Schools Act, and the provisions of the Assessment Act thereby made applicable.

Section 17 of the Real Property Limitation Act provides that: "At the determination of the period limited by this Act to any person for making any entry or distress or bringing any action or suit, the right and title of such person to the land or rent for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished."

Section 24 of the Real Property Limitation Act provides that: "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or

any legacy, but within 10 years next after the present right to receive the same accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon has been paid, or some acknowledgment of the right thereon has been given in writing signed by the person by whom the same is payable or his agent, to the person entitled thereto or his agent; and in such case no action, suit, or proceedings shall be brought, but within 10 years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was made or given." Do proceedings under sec. 263 of the Public Schools Act come within this section?

Counsel for the defendant municipality argued that the words "at law or in equity" must be read with the words "no action or suit or other proceeding," while the plaintiffs' counsel contended that they must be annexed to the words "charged upon or payable." In view of the provisions of the King's Bench Act, fusing the Courts of Law and Equity, these words are clearly superfluous on the first construction. They occur in sec. 23 of the Real Property Limitation Act of Ontario, 1877, but are not to be found in the revision of 1887, the Judicature Act having been enacted in that province in the meantime. On the whole, it seems reasonable to hold that these words naturally qualify those next preceding, to which they can be made properly applicable, as is contended by the plaintiffs.

Can the words "other proceeding" be held to include the proceedings sought to be restrained in this action? In Neil v. Almond, 29 O. R. 63, it was held by Ferguson, J., that the taking steps by an execution creditor to sell lands under a writ of fi. fa. under the provisions of the Rule in that behalf is, or would be, a proceeding falling within the words "other proceeding" in sec. 23 of ch. 111, R. S. O. The learned Justice quotes with approval the definition of the term "proceeding" in the Am. & Eng. Encyc. of Law: "'Proceeding' means in all cases the performance of an act, and is wholly distinct from any consideration of an abstract right. It is an act necessary to be done in order to attain a given end, it is a prescribed mode of carrying into effect a legal right, and, so far from involving any consideration or determination of the right, presupposes its existence." He refers to the case of Smith v. Brown, 20 O. R. 165, where

he had previously held that an advertisement for the sale of land was a proceeding within the meaning of the words "no further proceedings" in sec. 30, ch. 102, R. S. O.

The power given by sec. 85 of the Companies Act, 1862, to restrain "any action, suit, or other proceeding" against a company in liquidation, extends to quasi-criminal proceedings, to going to sale under a fi. fa. executed by seizure, and to distress for rent: In re Exhall Mining Co., 4 De G. J. & S. 377; In re Higginshaw Mills, [1896] 2 Ch. 544. A mortgagee with an attornment clause is, in this respect, in a more unfavourable position than a landlord: In re Lancashire Cotton Spinning Co., 35 Ch. D. 656; Stroud's Judicial Dictionary, vol. III., p. 1562. On the whole, it seems to me, the authorities amply justify holding that proceedings under sec. 263 of the Public Schools Act are within sec. 24 of the Real Property Limitation Act.

In McDonald v. Grundy, 8 O. L. R. 113, a mortgagee attempted to exercise a power of sale after the mortgagor had been in possession more than 10 years under the circumstances set out. It was held by Meredith, J., that the proceedings were such as a mortgagee is precluded from taking after a lapse of 10 years under sec. 23, ch. 133, R. S. O., 1897. "The sale proceedings are proceedings to recover, out of the land, money secured by mortgage upon such land: it is by means of these proceedings that the defendant seeks and intends to recover the money secured by the mortgage in question:" p. 115. This language appears to me to be applicable also to the proceedings sought to be restrained in this action.

Do the moneys required to be levied constitute a lien on the lands? Section 140 of the Assessment Act provides that "the taxes accrued on any land or personal property shall be a special lien on such land or personal property, having preference over any claim, lien, privilege, or incumbrance of any party excepting the Crown, and shall not require registration to preserve it." It may be argued that these moneys are not taxes, but a rate sufficient to cover the amount due on the execution and for costs thereon. The treasurer is commanded to levy such rate at the time and in the manner by law required in respect of the general municipal rates. While there is in sec. 263 of the Public Schools Act no express re-enactment of or reference to sec. 140 of the Assessment Act, nevertheless, sec. 263

has undoubtedly the effect of subjecting the land to the rate levied by the treasurer and the amount for which the rate is levied becomes thereby a lien, charge, or incumbrance thereon.

I am, therefore, of the opinion that the plaintiffs are entitled to a declaration that the said levy or rate does not form a lien or charge on the lands in question, and to an injunction as prayed.

The appeal must, therefore, be allowed with costs, to the plaintiffs of the action and this appeal.

HOWELL, C.J.A. and RICHARDS, J.A., concurred.

MANITOBA.

METCALFE, J. DECEMBER 8TH, 1909.

TRIAL.

McKEAGUE v. GREAT WEST CONSTRUCTION CO.

Trespass—Damages—Injury to Fence—Failure of Proof—Nominal Damages.

Action for damages and an injunction.

R. M. Dennistoun, K.C., and J. R. Young, for the plaintiff.

J. E. O'Connor and H. P. Blackwood, for the defendants.

METCALFE, J.:—The Inter-Ocean Real Estate Company erected an apartment block in the city of Winnipeg, called the "Touraine block." The defendant Melville was the architect for the construction of the building. Lot 715, being the land immediately adjoining the south side of the building, is vacant. It belongs to the plaintiff. The south side of the apartment block appears to be on the line between the plaintiff's land and the land occupied by the apartment block. The footings of the foundation of the block project into, and the cornices at the top of the block project over lot 715, the plaintiff's land. The building is four storeys high. About the middle of the south wall,

being the wall between the plaintiff's land and the land occupied by the block, is situate a light-well, with a balcony for each floor, and on each side of the light-well there are 4 windows on each floor, or a total of 32 windows. There are 2 of these windows to each suite, so it appears there are 16 suites on the south side of the block.

After the construction of the block, it became the property of the defendants the Great West Construction Company Limited. Melville and the defendant Rowe are directors of this company. The defendant Anderson is the caretaker of the block.

The plaintiff desired to dispose of his land to the Great West Construction Co., and for that purpose went to the office of the defendant Rowe to negotiate. Rowe told him that he would lay the matter before the directors, and afterwards the plaintiff called again at Rowe's office, and Rowe told him that the directors had decided not to buy the lot. The plaintiff says that at this interview he told Rowe that he would put up a fence, and that Rowe told him, if he did, "they would knock it down." This Rowe denies. At all events the plaintiff commenced to construct a fence about 110 feet long, intending to cover all the windows on the south side. To make this fence more effective, he placed black tar paper on the side of the fence nearest to the windows. He employed one Olson to construct this fence. Olson says that during Friday night, when the work had proceeded so that it entirely covered the windows of the first three floors, the fence received severe treatment from some source. The east wing of the fence was leaning southward away from the building and almost falling. Olson and some men who were working with him got a rope which they passed along the south side of the fence, and, passing it around a telegraph post situate northward down the lane, they started to pull back the fence to its former condition. The rope passed around the corner of the defendants' block and applied pressure thereto.

The defendant Anderson, after warning Olson to remove the rope, got a knife upon a long stick and leaned out of one of the windows on the south side of the block over the plaintiff's land and cut the rope. Olson says he called out to Anderson not to do that, as his father was on the ladder, and he was afraid the fence would fall and thus do bodily injury. He says, however, that he was able, during the

time that the rope was being cut, to hammer in a sufficient number of iron spikes to prevent the fence from falling. Olson then got the fence braced so that by Saturday night it was again in position.

During Sunday and Monday nights the fence was attacked by scantlings from within the Touraine block. These scantlings were applied through the windows and from the balconies around the light-well. Although the plaintiff was there some of the time, and a watchman employed by him was there during the whole of these attacks, they were unable to see who did the damage. The different defendants were examined for discovery, and the plaintiff put in portions of these examinations. Both in the examinations so put in and in the box on their own behalf the defendants say that they purposely avoided informing themselves as to who were knocking down the fence. Some of the defendants reside in the Touraine block. I have no doubt that the defendants could easily have ascertained who were doing the damage.

Eventually on Monday night these attacks from the block were successful, and the fence fell outward, whereat, we are informed, a cheer arose from the crowd there assembled.

There is no doubt that there were tenants in the block whose windows were obscured by the fence. Olson says he saw them when he was building the fence, and he says that one lady expressed the kind sentiment that "she would like to see us fall down."

It is quite evident that the fence, with its sheeting of black tar paper, was quite as offensive to the tenants as to the owners of the block. The only direct evidence to connect any of the defendants with the destruction of the fence is the evidence of Smith, who says he saw some one stoop and pull at a brace, and that it came down. He says this person went across the street and afterwards came back, and that he then recognised the defendant Melville. A crowd had gathered there at this time, and Smith might easily have been mistaken in his identification. The evidence is unsatisfactory. Melville denies it, and I cannot find, on the evidence, that it has been shewn that Melville did, in any way, take part in the destruction of the fence.

The plaintiff has not shewn that the defendants threw down this fence.

I do not think the defendants were justified in cutting the rope. The injury threatened to the building was not, in my opinion, grave enough to justify that action. No special damage, however, has been shewn to have resulted from the cutting of the rope.

The footings and cornices have, since the trial, been removed, and no special damage has resulted therefrom.

There will be judgment for the plaintiff for $1 and costs on the King's Bench scale.

MANITOBA.

METCALFE, J. DECEMBER 11TH, 1909.

SINGLE COURT.

MOORE v. McKIBBIN.

Municipal Corporations — Local Option By-law — Liquor License Act — Petition for Submission of By-law — Signatures — Opportunity for Fraud — Duty of Council — Injunction.

Motion by the plaintiff for an injunction to restrain the defendant from submitting to the electors of the municipality of Roblin a by-law to repeal a local option by-law.

R. D. C. Maclean, for the plaintiff.

S. J. Rothwell and F. M. Burbidge, for the defendants.

METCALFE, J.,:—The plaintiff is a ratepayer of the rural municipality of Roblin. In September, 1909, a petition was presented to the council under sec. 74 of the Liquor License Act, to submit to the people a by-law to repeal the present local option by-law of the municipality. The council treated the petition as being properly presented, and on the 21st October the repealing by-law had its first and second readings, and the council is about to submit the by-law to the vote of the people. The secretary-treasurer of the municipality says that he has received instructions to do so, and that he has advertised and done everything necessary, and that the vote is about to be taken unless restrained.

The plaintiff filed his statement of claim and brought this motion for an injunction restraining until the trial of

the action, or until further order, the defendants from continuing to proceed with the passing of the said by-law, and from submitting the same to be voted on by the electors of the municipality, and from taking any further proceedings in connection therewith.

On the return of the motion the defendants' solicitors took several preliminary objections to the material, amongst others being: (1) that no material was filed; (2) that short notice of motion had been given, and that the name of the Judge who had given the special leave was not mentioned in the notice of motion; (3) that the affidavit in support of the motion was sworn to on the 24th November, and that tne statement of claim was issued afterwards, viz., on the 25th November.

I considered the first two objections irregularities only, and gave leave to perfect the material.

The third objection I considered fatal. After consideration I gave the solicitor for the plaintiff leave to file a new affidavit and to base his motion upon the affidavit so filed. This affidavit being filed, the motion then proceeded.

At the hearing it appeared that there were three documents filed, at the beginning of which, in each case, appears the petition attached by a pin to separate sheets of paper, upon which no portion of the petition appears. These three petitions received signatures upon the portion of the paper bearing the petition, but in the case of two of the petitions a large number of signatures appear upon the sheets attached thereto and upon which appears no portion of the petition.

At the hearing the plaintiff contended that the petition was invalid upon two grounds: (1) that a large number of the names appearing on the petition were those of non-resident voters; (2) that the signatures, being attached upon sheets upon which no portion of the petition appeared, ought not to be considered, and, if not so considered, the requisite number of signatures was not before the council.

Regarding the first objection, the plaintiff produced the last revised voters' list and shewed that some of the names signed for the petition appeared upon this voters' list as non-resident voters. No other evidence was given as to their non-residence. After deducting those names so appearing as non-resident, however, from the names on the petition as a whole, it appeared that there was still a suffi-

cient number of names to comply with the provision as to 25 per cent. of the resident voters, and the plaintiff thereupon abandoned that contention.

The plaintiff argues in support of his second contention, that the sheets which appear at the end of each petition, and which contain signatures, might have been obtained as a part of an entirely different petition, and might have been abstracted therefrom and attached to this petition. He says that a petition in that form leaves it open to the petitioners to practise such frauds upon the public.

Realising the gravity of the plaintiff's contention, I have given the most careful consideration to this argument. The plaintiff urges the decision of Adams v. Woods, ante 135, but in that case the documents which constituted the petition were admittedly signed in a form different to the form presented to the council. There was no doubt as to the cutting off and mutilating of the headings of the petition, and it could not be established without secondary evidence that the form of all the petitions, admittedly destroyed, was similar to the one pasted at the beginning of the petition.

This contention was pointed out to the council at the time, and the facts were admitted and relied upon at the hearing. It does not appear that in this case any exception was taken before the council as to any fraudulent practices with regard to the petition, and the council has satisfied itself as to the validity of the petition, in the absence of such objection, and has acted upon it.

The counsel for the plaintiff produces no evidence of any such fraudulent practices, neither is any evidence observable to the eye in the nature of the petitions, but counsel merely suggests that some alteration may have taken place. In Adams v. Woods there was no doubt that an alteration had taken place. In the present case the petitions themselves do not suggest any alteration. It is shewn that when they were presented to the council the sheets were pinned together and to the prayer, as they are now, and the condition of the documents would seem to indicate that they were prepared and pinned together and given to the parties to obtain the signatures in that condition.

If any practices suggested by the plaintiff were carried on, then I must assume that some one was guilty of the gravest fraud. I do not think I can assume this. The

presumption is, I think, that they were executed in the form presented to the council.

If these petitions were signed in their present form, the signers to the petitions could have no doubt as to what they were signing.

At the conclusion of the plaintiff's case counsel for the defendants argued that the plaintiff was not entitled to succeed upon his own shewing. I, however, intimated that, considering the gravity of the matter at issue, I would reserve judgment.

The defendants thereupon asked leave to call testimony, which leave was granted, and thereupon they produced two witnesses, one of whom had the conduct of the execution of each of the disputed petitions. These witnesses swore that the petitions were in their present form in each case when they were signed by the electors, and cross-examination, instead of weakening this testimony, rather strengthened it.

I therefore find that the petitions were in their present condition when signed by the electors.

I think the statute, when it uses the word "petition," means a petition in the usual and ordinary form. There is no doubt that the documents here filed are in the usual and ordinary form. It is usual and customary in the preparation of documents that sheets intervene between the first and last pages. We receive constantly in proceedings in this Court not only in the form of affidavits upon which proceedings are based, but also in the form of petitions, many documents in which many pages intervene between the first and last pages thereof. To give effect to the plaintiff's contention would be to seriously question the validity of any of these documents.

While it is no doubt true that serious abuses might arise in the present contest between the people representing the local option opinion and those representing the liquor interests, it is not a matter within my province, but within the province of the legislature. If it is desired by the legislature that something other than the ordinary and usual petition should be used, then the legislature must deal with that, and state specifically the form of the petition and the nature of the execution thereof. With the statute, however, in its present condition, I must refuse to give effect to the plaintiff's contention.

The motion is therefore dismissed with costs.

MANITOBA.

COURT OF APPEAL.

DECEMBER 13TH, 1909.

ADCOCK v. MANITOBA FREE PRESS CO.

Security for Costs—Libel Act, sec. 10—Corporation Defendant—Affidavit made by Officer—Sufficiency—Increased Security—Rules 982, 983, 987—Dismissal of Action—Practice.

Appeal by the plaintiff from an order of MACDONALD, J., in Chambers, dismissing an appeal from an order of the Referee in Chambers, requiring the plaintiff to give additional security for costs.

The appeal was heard by HOWELL, C.J.A., RICHARDS, PERDUE, and CAMERON, JJ.A.

N. F. Hagel, K.C., and H. P. Blackwood, for the plaintiff.

H. Ormond, for the defendants.

HOWELL, C.J.A.:—The first point to be considered in this case is whether a corporation defendant is entitled to an order for security for costs under sec. 10 of the Libel Act. That section requires the affidavit of the defendant in support of the motion, and, as a corporation cannot make an affidavit, it is argued that no order can be made. Section 14 of the Act shews in the clearest language that the statute was intended to apply to corporations as well as individuals, and I should think Rule 508 of the King's Bench Act would apply, but, if it did not, I think there is authority for holding that the affidavits are a substantial compliance with the Act. Under the old Common Law Procedure Act a defendant upon filing his affidavit was entitled to discovery; and in Kingsford v. Great Western R. W. Co., 16 C. B. N. S. 761, it was held that, as this provision was intended to apply to all defendants, it would apply to corporations defendant, and that an affidavit by the company's solicitor was a substantial compliance with the Act. In this case the affidavits are made by Mr. Dafoe, the editor in chief, and the solicitor.

It is further argued that, an order having been once made for security, there is no power to grant a second order.

I think Rule 982 and the following Rules apply to all statutes providing for security for costs, for the reasons given by my brother Cameron.

The appeal should be dismissed with costs.

CAMERON, J.A..—In my opinion, the affidavit made on the application for security sufficiently complies with the provisions of sec. 10 of the Libel Act. This seems to me clear in the light of Rule 508 of the King's Bench Act.

I am further of the opinion that with sec. 10 of the Libel Act must be read Rules 982, 983, and 987 of the King's Bench Act. In such an action as this now before us, therefore, the security is to be of such amount and to be given at such time and in such manner as the Judge shall direct; in default of security being furnished within the time limited by the order, the plaintiff is liable to have his action dismissed, and before or after the security is furnished its amount may be increased or diminished by the Judge. There was ample jurisdiction to make the order appealed from, and I do not think the discretion of the Judge who made the order should be interfered with.

The order of the Referee should, however, be varied by striking out that portion of it providing for the dismissal of the action. While such a provision is contemplated in the case of orders made under Rule 978, there seems to be no authority for it in a case of this kind. Should the order for security not be complied with within the time limited, then a substantive application for dismissal of the action must be made.

The appeal must be dismissed with costs of this appeal and of the appeal from the order to the Referee, to be costs in the cause to the defendants.

RICHARDS and PERDUE, JJ.A., concurred.

MANITOBA.

DECEMBER 13TH, 1909.

COURT OF APPEAL.

McCORMICK v. CANADIAN PACIFIC R. W. CO.

Trial—Order for Trial by Jury—King's Bench Act, sec. 59 (b)—Discretion—Appeal.

This action was brought under the Act respecting compensation to families of persons killed by accident, R. S. M.

1902 ch. 31, by the wife and daughters of one James McCormick, who was killed in an accident on the defendants' railway. An application was made by the plaintiffs to have the trial of the action take place before a jury. This application was refused by the Referee in Chambers, and on appeal to METCALFE, J., the refusal was upheld. From that order the plaintiffs appealed.

W. H. Trueman, for the plaintiffs.

W. H. Curle, for the defendants.

The judgment of the Court (HOWELL, C.J.A., RICHARDS, PERDUE, and CAMERON, JJ.A.), was delivered by

PERDUE, J.A.:—By sec. 59, sub-sec. (b), of the King's Bench Act, all actions, causes, matters, and issues, except those previously dealt with in the section, are to be tried by a Judge without a jury, unless otherwise ordered by a Judge. This action is one to which sub-sec. (b) would apply.

Whether an action to which the sub-section applies shall or shall not be tried by a jury, is a question within the discretion of the Judge to whom the application is made. The English Rule relating to trials by juries in actions assigned to the Chancery Division is, in effect, much like the above sub-section: Rules of Sup. Court, O. 36, r. 3. The decisions under that Rule are clear that the discretion of the Judge exercised in such a case will not in general be interfered with by the Court of Appeal: Swindell v. Birmingham Syndicate, 3 Ch. D. 127; Thornton v. Union Discount Co., 7 Times L. R. 410; Rustin v. Tobin, 10 Ch. D. 565. It is true that the appellate Court will interfere if the discretion has been exercised upon a wrong principle, as in Jenkins v. Bushby, [1891] 1 Ch. 484; but in the present case no attempt has been made to shew that the discretion was wrongly exercised.

The appeal should be dismissed, with costs to the defendants in the cause.

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MANITOBA.

MACDONALD, J. DECEMBER 13TH, 1909.

TRIAL.

KELLY v. KELLY.

Partnership—Dissolution—Account—Division of Profits — Private Speculations and Investments of Partner — Entries in Firm Books — Profits from Speculation with Firm's Moneys—Evidence—Declaration.

Suit to dissolve a partnership and take accounts.

J. E. O'Connor and H. P. Blackwood, for the plaintiffs.

T. L. Metcalfe and G. D. Minty, for the defendant.

MACDONALD, J.:—The parties to this action are brothers, and the action arises out of business transacted by the defendant, which he alleges was his own and with which the partnership had nothing to do. Whereas the plaintiffs allege that they were partnership dealings, and that the moneys used in the transactions referred to were partnership moneys, and the profits arising from such business, partnership profits, in respect of which they are entitled to an account in the winding-up of the partnership.

A considerable volume of business was transacted by the defendant; a number of parcels of land in the city of Winnipeg and elsewhere being purchased by him; several of such parcels, particularly in the city of Winnipeg, having been greatly enhanced in value, and on a sale by the defendant having netted large profits.

A great deal of evidence was adduced upon the trial; this was necessitated by reason of the fact that each transaction was fully gone into and investigated; but my finding as to a few of the transactions will suffice as to all for the purpose of my conclusion.

The defendant and the plaintiff Michael Kelly entered into partnership in 1881 as builders, contractors, and brick manufacturers. In its origin the business was very small, and very little capital was invested in it.

Prior to the formation of the partnership, Michael Kelly sold some property, and gave his brother, the defendant, $450, part of the moneys realised from such sale, and this, with a like amount which Thomas Kelly had, was the nucleus of the successful business results which followed, and with this beginning the two brothers formed the firm of Kelly Brothers. Up to 1885 the business was not a success, and that year found it practically insolvent, until the defendant, with one Armitt, secured a contract with the Hudson's Bay Co. to supply teams of horses for use in quelling the rebellion in that year. Out of this contract was made a profit of some $15,000, and, although the defendant asserts that Michael Kelly had no interest in this contract, yet he throws this into the partnership, placing the firm again on a good financial foundation, and the business continued until 1886, in which year Martin Kelly was engaged to look after a contract the defendant claims to have had in Nebraska, and out of which contract it was agreed that Martin Kelly was to receive one-quarter interest. Upon the completion of this contract Martin Kelly returned to Winnipeg, and remained with the firm of Kelly Bros. without any arrangement being made as to his interest in the business. He, however, tacitly became a partner, and was thereafter recognised as such, having a one-quarter interest. He put no money into the business beyond what his interest would be in the contract which he looked after at Nebraska, the total profit in which he himself places at $5,000, but there is no evidence that this money was ever put into the business of the firm. Prior to Martin Kelly having become a member of the firm, the brothers Thomas and Michael had acquired property on Notre Dame street, in the city of Winnipeg, and this was built on when Martin Kelly was in Nebraska, and before he became a partner. The latter does not claim any interest in the land, but he lays claim to the

property now to the extent of the moneys expended in constructing the buildings. This claim is unreasonable, as he was not a partner at the time, but only a partner in the Nebraska contract with the defendant. The Notre Dame property, I find, was the joint property of Thomas and Michael.

Michael Kelly says, with respect to this property: "Before Martin came in, we had bought lots 24 to 30, D. G. S. St. John. Tom took it in his own name. I told him to buy it and we would divide up when everything was over." And, although this property is not the subject of dispute beyond Martin Kelly's unfounded claim to part, it is of assistance in forming conclusions as to the subsequent land and other speculations. The entries for the Notre Dame property are transferred to the firm's ledger, exhibit 7, pp. 29, 30 and 31, and from that ledger to ledger exhibit 6, pp. 129 and 130. There is nothing in the entries to indicate that this property belongs to Thomas and Michael Kelly, although such is the case.

Following the purchase of this property was the purchase of lots 41, 46, 47, 48, and 49, which were purchased by the defendant and Michael Kelly and Dennis Bawlf. Bawlf defaulted in his payment, and the entire interest was taken over by Thomas and Michael, and an account was opened in the firm ledger exhibit 7, p. 32, at the heading of which appears this notation: "Half interest Notre Dame. July 20/91. We have entire interest in these lots, half interest recently secured cost $2,315.48." A clear indication of its being a firm purchase. This account was transferred from ledger exhibit 7 to the firm's ledger exhibit 6, p. 131, notwithstanding the admitted fact that Martin had no interest. The fact, therefore, of the various investments and speculations claimed by the defendant as his, and not the firm's, appearing in the firm's books, signifies nothing, and such entries, in view of the evidence, are quite consistent with the defendant's contention. There were several other purchases of real estate by the firm, and then follows the first of the transactions in dispute: "Quill Lake Lands," exhibit 6, p. 135.

The original entry of this transaction in this ledger was made by Michael A. McCormick, the firm's bookkeeper at the time, as follows: "Dr. Real Estate Cr.;" and in red ink this memorandum: "6,560 acres bought by T. K. and

F. H. P. at $3.00 pr. acre—(pro. Govt.) 1/10, payment made by T. K. 1-2 ch. to be returned by F. H. P."

This heading was afterwards added to by Robert E. Kelly, a son of the defendant, who succeeded McCormick as bookkeeper—the words "Kelly & Phippen" immediately preceding the words "Real Estate," and the words "Quill Lake lands" following. These added words are commented upon as a suspicious circumstance, and possibly without the red ink memorandum might be so held, but the entry of the words "bought by T. K. and F. H. P.," made at the time of the transaction under instructions of the defendant to McCormick, removes that suspicion, and convinces me that this property was purchased by Thomas Kelly and F. H. Phippen as a joint speculation, in which it was never intended that the plaintiffs were to have any interest. It is not pretended that they were ever consulted or knew anything of the matter until some considerable time after, and it does not seem to me to be reasonable that the defendant would ask his personal friends to join his firm in private speculations. This conclusion may seem inconsistent with preceding findings of purchases of land by the firm, but in all the cases in which property was purchased for the firm it was in some way connected with or required for the firm's business as brick manufacturers, and they purchased some property for the purpose of putting their bricks into buildings. It is also a significant fact that the properties conceded as the firm's were purchased with the knowledge and consent of the plaintiffs, whereas those claimed by the defendant as his were purchased without their knowledge.

The second transaction attacked is the purchase of farm lands described as at or near Gladstone and Plumas. The purchase was made by Thomas Kelly and F. H. Phippen, and the original account in the ledger exhibit 6, p. 251, made by McCormick under instructions from the defendant, was "Dr. Kelly & Phippen, Cr.;" the red ink notations were made by Robert E. Kelly, who succeeded McCormick as bookkeeper.

Then followed the following speculations: "Land Warrants" with "Thomas Kelly & F. H. Phippen" in red ink, exhibit 6, p. 135; "Lots 405 and 406, Portage avenue," exhibit 6, p. 135. It is admitted that the name of Thomas Kelly immediately preceding the description of the lots was written in by Robert E. Kelly long after the original entry.

"Kelly & McKenzie. Main street property 50 ft. at $1,000 per foot—Thos. K. and R. J. McK. ½ interest each." This is all in McCormick's handwriting, and memorandum made at the time of the transaction, exhibit 6, p. 138.

"Kelly & Maw," and in red ink, "Lot 320 Portage Ave. Purchased by T. Kelly and J. Maw, ½ each." This is all in McCormick's handwriting, and made at the time of the making of the contract: exhibit 6, p. 246.

"Kelly & Maw," and in red ink in McCormick's writing, and made at the time of the contract, the words, "purchased by T. K. and J. M. ½ interest each."

"Kelly & Maw," and in red ink "Lot 40 & 41, Bannatyne East, purchased by T. K. and J. M.—½ interest each," in McCormick's writing and made at the time of contract. This is the property that afterwards became the property of the firm by the withdrawal and release of J. Maw from the contract. The defendant then, it is admitted, consulted his brothers and suggested the taking over of the property by the firm, which was done, and it thus became firm property. This circumstance seems to me to favour the contention of the defendant that the other speculations were his own, although unfavourably commented upon by counsel for the plaintiffs, as shewing, by not claiming the original half interest, that such was intended as a firm transaction. It seems to me only reasonable that, upon consulting his brothers and suggesting that the firm should take the property, he should make it all a firm asset.

"Kelly & Phippen." This is an entry referring to the purchase of 640 acres of land at Quill Lake, and the entry is in the writing of Robert E. Kelly, exhibit 6, p. 249.

"Kelly & Baird." The opening of the account was by McCormick, and the red ink notations were made by Robert E. Kelly, exhibit 6, p. 250.

There are a number of other transactions of a similar character, similarly entered on the books of the firm, and also claimed by the plaintiffs as partnership matters.

The fact that these accounts and a record of the various deals are kept in the books of the firm is not conclusive evidence that they are firm matters, nor yet is the fact that they are so because of the vagueness or even omission of the memoranda or notations explanatory of the transaction, as asserted by the defendant.

The defendant was the guiding hand and controlling mind in the business of the firm as builders and contractors. He was, by his personal influence and keen business sagacity, building up a business of splendid proportions. The brothers were of little assistance to him, except as faithful and good mechanics, and through his efforts he placed them in a financial position that, to my mind, they would not have attained had it not been for the capable head of the firm. Feeling his position and resourcefulness in and to the firm, he, to a considerable extent, dominated his partners and kept them under check in their cash drawings from the firm, whilst he himself drew heavily for his private speculations. He treated the business as if it were his own, thinking, no doubt, that as he was making his brothers rich they would be content and take no objection to his use of the firm's money to the extent to which he would be entitled on a division for his private purposes.

McCormick was the bookkeeper of the firm during most, if not all, of the time of the taking place of the transactions under investigation, and he made the first entry already referred to, exhibit 6, p. 135. He says in his evidence: "I headed the a/c 'Real Estate.' I took everything in the firm book as firm's business. I learned of the transaction from T. Kelly. I was not directed by any one to enter in this way. I do not know if this was known to Thomas Kelly. This is the way I entered it. The same applies to all the land entries in my handwriting." Yet this first entry is in these words: "6,560 acres bought by T. K. and F. H. P. at $3.50 per acre, 1/10 payment by T. K., ½ ch. to be returned by F. H. P." The information by which this entry was made he got from Thomas Kelly, and the fact that he took everything in the firm's books as firm's business has no weight.

He knew that the Notre Dame property and Adelaide street properties were not owned by the firm, yet the records of these were in the firm's books.

The plaintiffs express absolute want of knowledge of anything pertaining to bookkeeping. McCormick says that the defendant did not know anything more about books than they did.

After the retirement of McCormick as bookkeeper, Robert E. Kelly, son of the defendant, took charge of the books, and brought to his father's attention the irregularity of the entries and records of his private speculations, and, as a result,

the real estate accounts were closed by charging Thomas Kelly with all moneys disbursed and crediting him with receipts and profits and in one instance "Land Warrants," exhibit 6, p. 135, charging Thomas Kelly with a loss which had been in 1902 charged to profit and loss account. This was, however, done on the initiative of the bookkeeper McCormick, who, no doubt, got his knowledge of the loss from the defendant, but made the entry as he did without instructions.

It is also urged that Thomas Kelly originally intended the dealings in question to be the firm's, because of the fact that the properties purchased by him were included in statements made out to the firm's bank from time to time, and on the strength of which the firm was enabled to get credit. Taking into consideration, however, the manner in which they did their business, and the fact that the properties owned by Michael and Thomas Kelly jointly as well as the homes of the partners, which were theirs individually, were included in these statements, this contention carries no weight. The properties individually and jointly owned by them would be available for their debts.

I find that the defendant purchased the various properties mentioned without any intention of making them firm matters, and without any intention of creating any liability or benefit to the firm; that the record in the books of the firm of the various purchases and sales made by him was simply as a matter of convenience, in the same way as the joint properties of the plaintiff Michael Kelly and the defendant were so entered, and that the entries in the books which would indicate any of the business deals as those of the firm were errors in bookkeeping, and made without the knowledge of the defendant; that the plaintiffs were not aware of the use of the firm's funds by the defendant for his own benefit, nor did they ever consent to the same.

Now, the only point to consider and determine is the effect of using the firm's money for private speculations.

There is no question that the moneys used by the defendant were moneys to the credit of the firm of Kelly Bros. & Co. or moneys advanced on the strength of the financial soundness of the firm.

It is true the firm's financial position at the time was strong, their building contracts realising splendid profits, and, although the defendant's share of these profits when

realised would have justified withdrawals to the extent of his investments, yet they did not lose their character of firm assets, and could not be treated otherwise until a division was made. Furthermore, large withdrawals were made by the defendant before the actual receipt of the moneys earned on their several contracts, and on the strength of the firm's position.

The defendant urges that at the time of his heaviest withdrawals there was a large amount to his credit, but he loses sight of the fact that such credits were largely the proceeds arising from the land transactions, the subject of this investigation.

Section 24 of the Partnership Act, ch. 129, R. S. M. 1902, provides that, "unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm."

How can this contrary intention appear here? Only the defendant knew anything of these transactions at their inception. At first I was inclined to hold that the contrary intention of the defendant, as indicated by the entries in the ledger, was sufficient, but, upon maturer thought, I do not think this can be so. The contrary intention must be that of all the partners and not that of one.

Lindley, Blackstone ed., p. 35, says: "It is for the partners to determine by agreement amongst themselves what shall be the property of the firm, and what shall be the separate property of some one or more of them. Moreover, it is competent for them, by agreement amongst themselves, to convert what is joint property of all into separate property of some one or more of them and vice versa." And at p. 396: "The mere fact that the property was purchased by one partner in his own name is immaterial if it was paid for out of the partnership moneys, for in such a case he will be deemed to hold property in trust for the firm, unless he can shew that he holds it for himself alone."

The plaintiff Michael Kelly became aware of some of the speculations in question within a short time after they were entered into.

The "Kelly & Maw" lot, 212 Garry street, exhibit 6, p. 248, purchase, was made in November, 1902. In March, 1903, Michael Kelly issued a firm cheque for $397.25 on account of this purchase. He would be justified in thinking, as he swears he did, that this was a firm transaction.

The same applies to the south half of lot 2 Kildonan—Kelly & Baird, exhibit 6, p. 250. Michael Kelly says that he did not know these lots were claimed by Thomas Kelly, or he would not have signed the cheques.

The fact that the defendant was the manager of the business, the implicit confidence placed in him by his partners, the latters' lack of business ideas and ignorance of business methods, and the knowledge of the defendant of these facts, placed him in a strong fiduciary position with and towards them. Knowing their incapacity and simplicity in business matters, it was, it seems to me, his duty to have consulted them and obtained their approval of his private speculations with the firm's moneys.

In Helmore v. Smith, 35 Ch. D. 436, the Vice-Chancellor at p. 441, says: "One partner goes to the auction at which his partner's interest was put up for sale, and he there buys it, and how did he pay for it? By drawing out of the partnership account, as he himself says, this sum which he agreed to pay. Whose money was it? He cannot say it was his own. . . . One partner cannot say money belonging to the partnership belongs to him. Here the defendant could not even say half of the partnership money is mine, because there had been no division but out of the common stock which can only by law be dealt with, for partnership purposes . . . I cannot conceive a stronger case of fiduciary relation than that which exists between partners."

The case of Morice v. Hubbard, 10 W. L. R. 763, in our own Courts, seems to me in point. There the defendant used the partnership moneys, although forbidden by the plaintiff to do so, and made a substantial profit out of the investment. Yet it was held, notwithstanding the attitude of he plaintiff against the use of the partnership funds in the venture, that the profits should go to the firm.

Section 32 of the Partnership Act (supra) provides that "each partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property, name, or business connection."

The plaintiffs never consented to the use by the defendant of the partnership moneys for his own purposes. On the other hand, it seems to me clear, when they derived any

knowledge of any speculation by him, they considered it a partnership venture.

From my interpretation of the law all speculations entered into by the defendant, using partnership funds for the purpose, must be held to be for the benefit of the firm, and the firm entitled to all profits arising therefrom and to all property purchased with firm moneys.

The defendant is severely criticised by counsel for his conduct in connection with a sale of some of the firm's real estate to the Canadian Pacific Railway Co., and this transaction is made the chief instrument of attack upon his fitness to continue as the liquidator, as well as justifying a conclusion as to his dishonesty and studied efforts to defraud his co-partners. I am governed entirely in the impressions I have formed of the defendant from the evidence adduced upon the trial. To me he is a stranger. I do not share in the opinion formed by counsel for the plaintiffs. The three brothers, parties to this action, appealed to me as honest and truthful. The pity is that the love of gold should estrange them. The defendant sold this real estate to the Canadian Pacific Railway Co. for a sum of money which was immediately appropriated to the firm's account. This company were purchasing city property, and had asked the defendant to give them his assistance in acquiring lots adjoining Main street subway in the city of Winnipeg, and was promised, if he did so, he would not be forgotten. Two years afterwards, his services having, as he claims, been forgotten, he wrote the company (exhibit 219) making a demand upon them and making the sale of this property at too low a figure the basis of his demand, and as a result of this demand he received the sum of $7,500, and this he appropriated to his own use, because, as he says, he considered this an acknowledgment of his personal services to the company. Upon disclosing the facts of this transaction to his solicitors, he was advised to treat this as a firm transaction and give the firm the benefit of it, and he communicated all the facts to the plaintiffs by affidavit, a copy of which was served on the plaintiffs' solicitor, and offered to account. Up to this time the plaintiffs had no knowledge of this matter, and it strikes me that if the defendant is the unscrupulous character he is depicted, this transaction could have remained forever hidden.

The remaining point to be decided is the position of the plaintiff Martin Kelly in connection with the stock held by

him in the Manitoba Construction Co. This company was organised by the defendant, and a number of contractors became shareholders, and their business connection and interest, including that of the firm of Kelly Bros., became merged in and absorbed by this company, the firm of Kelly Bros. taking stock and becoming interested in the same proportion as were their interests in their firm. The plaintiff Martin Kelly claims to have taken equal interest with his brothers in this company, but in this he is not borne out by the evidence, and the fact of his holding a stock certificate from the company for a number of shares equal to that of his brothers does not establish his right to the position he takes. He did not put into this business an amount equal to that of each of his brothers. Their original holdings amounted to $12,000, Thomas Kelly and Michael Kelly each giving their note for $1,800 and Martin Kelly his note for $1,200. Subsequently 10 per cent. of their subscription was paid up; Thomas and Michael Kelly being each charged with $450 and Martin Kelly with $300. The holdings in the company were afterwards increased to 83 33/100 shares, and in part payment Thomas and Michael Kelly were each charged with $450 and Martin with $300. The interest of Martin Kelly was thus clearly shewn as one quarter and the brothers' each three-eighths.

The original intention was that this stock was to be assets of Kelly Bros., as the firm had not yet been wound up, but, for the purpose of having a voice in the conduct of the business of the new company, the shares were issued individually, and although, as between the company and Martin Kelly, he was the owner of an equal number of shares with his brothers, as between the brothers he cannot claim a greater interest than he had with them in the firm of Kelly Bros.

The firm will be dissolved.

I refer to the Master to inquire and report upon a fit and proper person to be appointed receiver of the partnership effects, and to take accounts of all partnership matters, including the speculations and ventures of the defendant Thomas Kelly with the firm's money or on the firm's credit, including the speculations and ventures specifically referred to, as well as any or all other speculations or ventures entered into by him in a similar manner.

I reserve the question of costs and further directions.

MANITOBA.

DECEMBER 14TH, 1909.

COURT OF APPEAL.

HATCH v. RATHWELL.

Municipal Corporations—Local Option By-law—Liquor License Act, sec. 62—Petition for Submission of By-law—Signatures—Detachment—Revival of Petition Prepared in Previous Year—Injunction.

Appeal by the defendants from the decision of METCALFE, J., ante 141.

E. L. Taylor, K.C., for the defendants.

A. J. Andrews, K.C., and F. M. Burbidge, for the plaintiffs.

The judgment of the Court (RICHARDS, PERDUE, and CAMERON, JJ.A.), was delivered by

CAMERON, J.A.:—A petition asking for the submission of a local option by-law to the ratepayers under the amendment of 1909 was prepared in September, 1908, and presented to the council of the rural municipality of Oakland on the 19th March, 1909. Between the preparation of the petition and its presentation to the council, the village of Wawanesa, within the limits of the municipality of Oakland as previously existing, was incorporated.

It is contended that the petition, having been signed in 1908, cannot be acted upon in 1909, the intention of the subscribers being that it should be acted upon in the former year. It is clear that the names of those signing the petition are more than the required number "of the resident electors whose names appear on the last revised municipal voters' lists of the municipality." No other test is prescribed by the statute, and I cannot give effect to this objection. The statute having been complied with, any question as to the motives of the petitioners is immaterial.

Nor can I see any force in the contention that the petition, having been placed in the hands of the clerk of the council in October, 1908, had served its purpose, and was, thereafter, for the purposes of the statute, non-existent.

The filing with the clerk was, for the purposes of the statute, inoperative. I cannot see how the taking of this inoperative step could put an end to the petition.

It is argued that the petition, having reached the council in October, 1908, was thereafter withdrawn without the council's consent, and that the presentation in March, 1909, upon which the action of the council is based, was invalid. The learned trial Judge finds as a fact that it was not presented to the council in 1908. Even if that were not so, the petition was not before the council to be acted upon in 1908, and was only formally received by the council for that purpose as of March, 1909. In all this there would seem to me no such irregularity as could have the effect of destroying the petition as such, or of invalidating the receipt of the petition by the council upon which the submission of the by-law is based.

As to the change in the municipality by the creation of the incorporated village of Wawanesa, it is admitted that there still remains on the petition the proper proportion of resident electors' names on the list in the rural municipality. A municipal corporation or a municipality is defined to be a public corporation created by the government for political purposes and having subordinate and local powers of legislation. It can exercise its corporate powers only within its defined limits. It does not own its defined territorial area, but is limited thereto as to its jurisdiction. The rural municipality of Oakland, therefore, has, notwithstanding the incorporation of the village of Wawanesa, continued unimpaired by the change, save that its jurisdiction is contracted to the extent of the area comprised in the village limits. To contend that the intentions of the petitioners were conditioned upon a state of facts that has been altered since they subscribed their names, and that their intentions might have been modified by such alteration, is to enter on a region of speculation. The fact is that there is a sufficient number of names affixed to the petition according to the last revised voters' list of this municipality, and that the petition has been duly presented.

I think the judgment appealed from must be reversed, and the motion for judgment dismissed, with costs of this appeal and of the original motion for the injunction.

ALBERTA.

STUART, J. SEPTEMBER 18TH, 1909.

CHAMBERS.

VARLEY v. DUVALL.

Summary Judgment—Rule 326—Action to Set aside Bill of Sale—Finding on Trial of Interpleader Issue—Adoption on Motion for Judgment.

Motion by the plaintiff for summary judgment under Rule 326 of the Judicature Ordinance.

The plaintiff in person.

J. T. Shaw, for the defendants.

STUART, J.:—This is an action brought to set aside a certain bill of sale given by the defendant Samuel H. Duvall to his son and co-defendant Charles W. Duvall as fraudulent and void.

The defendants appeared, and the plaintiff, upon leave given, served notice of motion for judgment under Rule 326. The ground taken in the application was shortly as follows. The present plaintiff was a judgment creditor in another action against the defendant Samuel H. Duvall, and had issued execution and seized certain horses, and the defendant Charles W. Duvall claimed these horses, and an interpleader issue was tried by Carpenter, District Court Judge, at Macleod, in which judgment was given for the claimant.

In that issue the question of the validity of the bill of sale which is being attacked in the present action was discussed, and the learned District Court Judge came to the conclusion that the bill of sale was fraudulent. However, he gave judgment for the claimant, upon the ground that the horses seized were not the identical horses covered by the bill of sale. On the trial of that issue the two present defendants gave evidence. A transcript of their evidence then given was obtained from the stenographer and was produced to me upon the present application, and I am asked now to consider the same and to come to the same conclusion summarily as the learned District Judge arrived at in the action which

he tried. The learned District Court Judge saw the witnesses and was able to satisfy himself that the bill of sale was really fraudulent, but I am unable to see how I can give any weight to his opinion upon this application. I have to consider the evidence for myself and arrive at my own conclusion upon the matter of fact. I can find nowhere in the evidence any direct admission by the defendants that the bill of sale in question was fraudulent, and I am simply asked to make this inference from the evidence which they gave. It is sufficient for me to say that I do not think it was intended that such a contest as this should be decided in a summary way under Rule 326. The action, I think, should go to trial, where the trial Judge will be able to see the witnesses and come to his own conclusions upon the oral testimony.

The application is, therefore, dismissed. In the circumstances, it is perhaps the fairest course to make the costs costs in the cause.

ALBERTA.

STUART, J. SEPTEMBER 18TH, 1909.

CHAMBERS.

STEPHENS v. CITY OF CALGARY.

Costs—Action Defended by Solicitor Remunerated by Salary —Right of Defendants to Tax Costs against Unsuccessful Plaintiff—Indemnity—Liability.

Application by the plaintiff, whose action was dismissed at the trial, and the dismissal affirmed upon appeal, for a review of the clerk's taxation of the defendants' costs.

C. B. Reilly, for the plaintiff.

W. S. Moffatt, for the defendants.

STUART, J.:—By by-law 925 of the city of Calgary, sec. 3, it is provided as follows: "The City Solicitor shall receive for all services to be rendered for the city the sum of $150 per month and in lieu of all fees and taxed costs payable in respect of any cause or matter." By sec. 4 it is provided as

follows: "All costs to be taxed or the proceeds of any judgment in favour of the city shall be paid to and form part of the general revenue thereof."

The simple ground taken by the plaintiff was that, in view of this agreement, the Corporation of the City of Calgary were not liable to pay to their solicitor any costs in respect of the action, and, as they were not so liable, they could not collect such costs from the unsuccessful plaintiff.

The case of Stevenson v. City of Kingston, 31 C. P. 333, was relied upon by the plaintiff, and counsel for the defendants relied upon Galloway v. Corporation of London, L. R. 4 Eq. 90.

I think, however, the point is more nearly covered by the later case of Henderson v. Merthyr Tydfil Urban District Council, [1900] 1 Q. B. 434.

In that case the District Council employed a solicitor and paid him a salary of £400 per annum, for which he was to prosecute and defend all legal proceedings taken by or against them and also to do other work. The plaintiff was unsuccessful in his action against the District Council, and they obtained judgment for costs against him. Upon the taxation the registrar disallowed every item except actual out-of-pocket expenses. Upon appeal to the Queen's Bench Division this decision was reversed.

I do not think it necessary to quote from the decision of Channell, J., which will be found at p. 436 of the report, but I think nearly everything which is there said is quite applicable to this case.

It is true that we have no provision in our Legal Profession Act corresponding to sec. 5 of the English Solicitors Act, 1870, nor was there in that case any such by-law as existed here. Even assuming that sec. 5 of the Act of 1870 is not in force here, as to which there may be some question, and upon which I do not think it necessary to express an opinion, it seems to me that, in the absence of any provision in our own Legal Profession Act, the principle of the decision quoted should govern the present case.

The practical effect of the by-law seems to me to be this: that the defendants do make themselves liable to remunerate the solicitor for all his work, including the work involved in defending the present action; that the defendants shall pay him a regular sum per month, namely, $150, for whatever he does during that month; and that, on the other hand,

the solicitor simply undertakes that he will accept such payment in lieu of the regular fees which could be charged by him against the defendants. In effect, the defendants are paying him, in some form at any rate, for the work which he did in defending this action, and I do not think a by-law which provides that any costs taxed in their favour shall be returned to them, is sufficient to deprive them of the right of being reimbursed by their unsuccessful antagonist for the payments which the defendants are really making to their solicitor.

As Channell, J., said in the case cited: "It is for the party objecting to the allowance of the usual costs under such circumstances to shew that the allowance will give more than an indemnity, and in all ordinary cases, such as the present, it is impossible for him to shew it."

Certainly, in the present case, no attempt was made by the plaintiff to shew that the allowance of the usual costs would give the defendants more than an indemnity.

For these reasons, I think the appeal from the clerk's certificate of taxation should be disallowed, and the same should be confirmed with costs.

ALBERTA.

STUART, J. OCTOBER 18TH, 1909.

CHAMBERS.

WILLIAMS v. McDOUGALL.

Solicitor—Contract—Champerty—Assignment of Judgment —Lien for Costs—Attachment of Debts — Priority of Garnishing Creditors—Costs.

The defendant, against whom the plaintiff had obtained a judgment, obtained a summons calling upon all parties having claims upon the fruits of the jugdment to come in and state the nature of their claims; and upon the return of the summons STUART, J., heard the parties.

G. H. Ross, for the defendant, the claimant Dunn, and garnishing creditors.

P. J. Bergeron, for the plaintiff's solicitor.

STUART, J.:—On the 15th April, 1908, one H. McClure Williams, who had a claim against one McDougall for a commission of $3,750 on the sale of 8,000 acres of land belonging to McDougall, entered into an agreement with B. W. Collison, a solicitor, in which, after a recital of the circumstances of the claim, the solicitor agreed to enter an action against McDougall for the amount claimed and to conduct the action to judgment. In return Williams agreed to pay the solicitor for these services "the sum of $2,000 and taxed costs in the event of judgment being entered against the said David McDougall in the name of the party of the first part, or the sum of $500 in the event of the judgment being entered in the name of the said David McDougall."

The action proceeded to trial and to appeal. The result was a judgment in favour of Williams against McDougall for $1,700 and certain costs. The judgment at the trial was for $3,725, and was rendered on the 20th February, 1909. Williams made an assignment of $2,000 and taxed costs out of this fund so recovered, reciting the agreement of the 15th April, 1908. About the same time Williams assigned to one Ross, a clerk in the office of the solicitor, a similar sum of $2,000, to be paid out of this judgment. The consideration for this assignment did not appear, because Ross did not endeavour to maintain his claim.

After the delivery of the judgment of the 20th February a large number of garnishee summonses were served upon McDougall by creditors of Williams, some of them in respect of judgments already obtained, some of them in respect of unproved claims.

McDougall applied for and obtained under Rule 392 a summons calling upon all parties interested in the fund to come in and prove the nature and particulars of their claims. On the return of this summons the garnishing creditors appeared, as well as the solicitor Collison, and stated the nature of their claims. Mr. Bergeron, who acted as counsel for Williams at the trial and on appeal, also claimed a solicitor's lien for costs.

The matter was heard on the 18th October before me in Chambers.

It was urged on behalf of certain of the garnishing judgment creditors that the agreement between Williams and Collison was champertous and void. I accede to this view, because, although Mr. Collison swore, and no doubt truth-

fully, that nothing was directly said as to the fund out of which the sum of $2,000 was to be paid, in case of success under the first agreement, yet, viewing all the circumstances of the case, I am sure that it was the understanding that it should be paid out of the judgment if recovered. There is the assignment which followed, the peculiar assignment also to Ross, which Collison could not explain, though Ross was his clerk, and also that the agreement called for a larger sum in case of success than in case of failure. This latter circumstance in itself brings the case quite within the principle of Earle v. Hopgood, 9 C. B. N. S. 564. Erle, C.J., in that case said, referring to the distinction between an agreement to give a portion of the proceeds or property to be recovered and an agreement merely to pay a sum which should vary according to the amount recovered: "The only difference between the two cases is, that in the former the party would have the security of the property, whereas here he has only the personal security of the defendant. But, if the defendant be a solvent man, he gets a share of the property by another mode, viz., by suing him and obtaining judgment."

It was contended, however, that Williams was the only person who could raise the question of champerty, and Knight v. Bowyer, 2 DeG. & J. 421, was cited. In my view, however, the evidence clearly established the insolvency of Williams, and I think, for the purposes of this application, his creditors, having obtained judgments, are clearly entitled to stand in his place.

The result is, that the agreement with Collison must be held void.

Collison, however, was the solicitor on the record for Williams, and as such prosecuted the action to judgment. He will be entitled to a lien for his costs upon the amount of the judgment against McDougall, which, I understand, amounts to $1,986.02, including taxed costs. This lien will include not merely the costs up to trial but also the costs incurred on account of the appeal. As Williams was directed to pay his own costs of the appeal, these latter will have to be taxed as between solicitor and client in order to ascertain the amount. These costs were necessary in order to defend the judgment already obtained, and the defence was in part, at least, successful. Any claim by Mr. Bergeron as counsel should, however, be included in the taxed costs of the solici-

tor on the record, Collison, and I assume that he may be, and has been, amply protected in that way.

This disposes of all matters substantially contested at the hearing. The relative order in which the claims of the garnishing creditors who have recovered judgments are to be paid, depends, of course, on the priority of service of the garnishee summonses. I understand the parties will be able to agree upon these priorities by reference to the sheriff's entries. If any occasion arises, the matter may be spoken to again.

The fund will thus be chargeable, first, with McDougall's taxed costs of this application, which was properly and unavoidably made; secondly, with Collison's lien for taxed costs as already stated; thirdly, with the amount of the judgments of the garnishing creditors in order of time of service of process.

As between contesting claimants, I think there should be no costs, except a counsel fee of $15, which the claimant Collison should pay to counsel for the claimant Dunn, whose argument was really on behalf of all the garnishing creditors.

ALBERTA.

HARVEY, J. NOVEMBER 25TH, 1909.

TRIAL.

PEMPEIT v. CANADIAN NORTHERN R. W. CO.

Railway—Neglect to Fence—Injury to Crops on Adjacent Farm by Cattle Trespassing—Railway Act, sec. 306—Time Limitation—Nonfeasance — Injury Sustained by Reason of the Construction or Operation of the Railway —Injury to Land by Contractor Building Railway — Throwing Earth on Land—Damages—Costs.

In the construction of the defendants' railway in 1906, earth was thrown on the plaintiff's land, and, by reason of the absence of proper fences along the railway, cattle came into his land and injured his crops in the years 1907 and 1908. On the 29th January, 1909, he began this action.

claiming damages in respect of the injury caused by his land being covered by the earth and the injury done to his crops in each of the years 1907 and 1908.

C. A. Grant, for the plaintiff.

C. F. Newell, for the defendants.

HARVEY, J.:—By agreement between the parties, the right to damages by reason of the injury to the crops in 1908 is admitted, and I am merely to assess the amount. The defendants, however, contest the plaintiff's right to recover damages in respect of the earth thrown on his land and the loss to crops in 1907.

As to the first matter, the evidence indicates that the earth was put on the plaintiff's lands by the contractors building the railway. For this reason, and also because of sec. 306 of the Railway Act, which limits the right of action to one year from the time the cause of action arose, I am of opinion that the defendants are not liable in respect of this claim.

Kerr v. Atlantic and North-West R. W. Co., 25 S. C. R. 197, is an authority for this conclusion on both grounds; and Montreal Street R. W. Co. v. Boudreau, 36 S. C. R. 329, on the ground of prescription.

As to the injury to the crop of 1907, Mr. Grant, for the plaintiff, contends that this is not a claim coming within the terms of sec. 306; that that section does not apply to damages caused merely by nonfeasance, such as in this case, arising, as they do, out of the defendants' neglect to comply with the statutory duty to fence.

It appears to me that the authorities do not support this view. I have had some doubt, however, whether the injury is "an injury sustained by reason of the construction or operation of the railway." Until a few years ago the provision was "injury sustained by reason of the railway." Under that form of words the application was considerably restricted, and it appears clear that the intention of the amendment was to extend the application.

Jacobs, at p. 524, says: "It may be safely stated that this section now applies to those cases in which the damage arises from the execution, or neglect in the execution, of the powers given to or assumed by the company, for enabling it to construct, operate, and maintain its railway."

I find, however, that, even in its restricted form, the Court of Queen's Bench of Upper Canada held that such a case as the present came within the terms of the section; see Brown v. Grand Trunk R. W. Co., 24 U. C. R. 350. I think, on the authority of that case, I must hold that the defendants are not liable for damages in respect of the crop of 1907.

The only question left to determine, then, is the amount of damages in respect of the 1908 crop.

It appears that the plaintiff had in crop in that year, in respect of which he claims damages, 65 acres of what and 20 acres of oats. The crop of wheat was 800 bushels and of oats 900 bushels. The evidence shews that cattle were frequently in the crops, and they must have done considerable damage. The amount of this damage is estimated by the plaintiff at 10 bushels an acre. I think, in view of all the evidence, that this is a reasonable estimate. The price he obtained for his wheat was 65 cents. The best wheat was selling at 80 cents, but the reason given why he received less was because some of the kernels were shrunken by frost, and because there was some smut. He says that the wheat was very slightly touched with frost, and I am of opinion that the smut must be taken as the real cause for the lower price. I do not think any allowance should be made on the score of frost.

The price to be allowed on the 650 bushels of loss will be 65 cents, less the expenses of threshing, hauling to market, &c., which I place at 8 cents a bushel, the threshing alone being given as 4 cents. The allowance, therefore, on account of the wheat will be 650 bushels at 57 cents, or $371.50.

The price of oats is given as 37 cents. I will allow 5 cents for expenses, and the allowance on account of oats will be 200 bushels at 32 cents, or $64, or a total of $434.50, for which the plaintiff will have judgment.

The plaintiff should have the general costs of the reference to me to assess the damages, which will carry the costs of the action; but, inasmuch as the argument was to a very considerable extent taken up with the points on which I have decided against him, there should be no counsel fee on the reference to either party.

ALBERTA.

STUART, J. DECEMBER 2ND, 1909.

TRIAL.

MORIN v. ANGLO-CANADIAN FIRE INSURANCE CO.

Fire Insurance—Illegal and Immoral Contract—Premises Occupied as a "Sporting House"—Intention—Voidable Contract — Public Policy — Unoccupied Premises — Changes Material to the Risk.

Action to recover $1,000, being the amount of a policy of insurance placed upon the property of the plaintiffs by the defendant company, of which amount $800 was stated by the policy to be "on the one storey frame shingle roofed building owned by the assured and occupied as a sporting house, situate and being on the east half of lots 14, 15, and 16, in Fairview subdivision of the city of Edmonton," and $200 upon the furniture contained in this house.

In defence to the action the company relied upon a number of defences; but at the trial only the following were insisted upon: 1st, that the contract was tainted with illegality, and therefore void; 2nd, that the premises were unoccupied at the date of the fire; 3rd, that there had been changes material to the risk, of which the company had not been notified, these consisting in the granting of a number of successive so called agreements of sale to women of ill-repute, who had been let into possession under such agreements.

John Cormack, for the plaintiffs.

J. E. Wallbridge, for the defendants.

STUART, J.:—The first defence raised presents a problem of considerable difficulty and one upon which I have very little direct precedent to guide me.

As far as I have been able to discover, there is not to be found any English case nor any case from any of the Canadian provinces where the English law is in force which touches the exact point. I find, however, a Quebec case, Bruneau v. Laliberté, Q. R. 19 S. C. 425, noted in the Can-

why any different principle should apply in the case of insurance upon such property.

A difficulty, however, arises in my mind when I endeavour to surmise what the decision of the Supreme Court would have been if the action had been brought by the prostitute upon the agreement of sale in order to compel specific performance of it. In the case as it stood the plaintiff was held to be innocent of any direct intent and purpose operating in her own mind as to the use to which the property was to be directed. Had the purchaser been plaintiff, such an intent and purpose would have been easily raised against her. In order to defeat her claim, would it still have been necessary, in the words of Gwynne, J., to shew an "intent and purpose operating in the mind of the transferor (the defendant in the case supposed) that the property when transferred should be applied by the transferee (the plaintiff in the case supposed) to the illegal purpose alleged?" I do not feel at all sure that such would have been the decision. At all events, it would certainly be the easiest thing in the world for the defendant in such a case to go the additional length necessary in order to avoid liability by simply avowing the existence of such intent and purpose in his own breast.

So in the present case, if the insurance company had been plaintiffs suing for the premium, I can quite understand how completely applicable the words of Mr. Justice Gwynne would have been. In order to defeat such a claim on their part as plaintiffs, it would clearly have been necessary, according to Clarke v. Hagar, to shew that they participated in the illegal intent and purpose. I say this, of course, on the assumption with which I shall deal presently again, that the same principle must apply to the case of an insurance company upon property to be illegally used as to the case of a sale of it. Assuming this, however, the question arises, are we justified in saying, upon the authority of Clarke v. Hagar, in the reverse case which is now in question, that in order to defeat their liability the company, when defendants, must shew the intent and purpose operating in the minds of their own officers that the property when insured should be used for an illegal purpose?

It is perhaps just as well that I should say, at this point, that I find myself unable to conclude that there existed in the mind of any officer of the defendant company any intent or purpose that the property when insured should be used as

a house of prostitution. Distinguishing knowledge from intent and purpose, as I think we must according to Clarke v. Hagar, the very most I could find as a fact would be that the defendant company knew that the plaintiff intended to use the property in that way. Even as to this there might be some doubt if I were to follow the authority of White v. Toronto Western Assurance Co., 52 Minn. 352, noted in 19 Cyc. 626, and in Cooley's Briefs on the Law of Insurance, vol. 1, pp. 546-547, where the Supreme Court of Minnesota, dealing with the very same expression "occupied as a sporting house," said that, as the term "sporting house" has an innocent as well as a guilty meaning, it cannot be said without proof of the sense in which it was used that the policy shews conclusively that the occupancy of the house was for unlawful purposes. In so far as the knowledge, intent, or purpose of the company at the date of the issue of the policy are concerned, it was not shewn that they knew anything more than what is indicated by the expression "sporting house." For myself, however, I am afraid I cannot assume such innocency in the minds of the officers of the company in regard to the real sense of the term "sporting house" as to refuse to ascribe to them knowledge at least of the nature of the use to which the premises insured were being put. But I certainly can go no further than to ascribe knowledge to them. It seems to me impossible to say, upon the evidence, that the company had any intent or purpose, operating in the mind of its officers, that the property should when insured be used as a house of ill-fame. Even if, in order to insure the company's escape from liability, any of their officers had sworn to the existence of such an intent and purpose, I doubt very much if I should have believed him. All the company intended or proposed was, in my view, to get the premium and to take the risk of loss. I cannot take judicial notice of the various rates of insurance upon property used in different ways. As a matter of fact I am unacquainted with them, and no evidence was submitted tending to shew that a higher premium was exacted owing to the nature of the occupancy of the premises. If it had been shewn that a higher rate was imposed for this reason, it might conceivably be argued that the imposition of a higher premium for such a reason was a participation in the intent and purpose of the insured. But even that I think would be going too far. Can it be reasonably asserted that an insurance company when

placing insurance on a certain property, say, a manufacturing plant to which extraordinary risk of fire attaches, and in collecting a higher premium for that reason, really have the intent and purpose operating in the mind of their officers to assist in the carrying on of the manufacturing business of the insured? On the contrary, I think their object, intent, and purpose in entering into such a contract is to carry on their own business and nothing more. The insured has one intent and one object. The insurer has another intent and another object. In any case I have no evidence of any higher rate being collected, and, for all these reasons, I feel quite unable to find as a fact that there existed any such purpose or intent as I have indicated in the minds of the officers of the defendant company.

It seems to me, therefore, that the contract was not void ab initio, but possibly voidable at the option of the innocent party. In Anson on Contracts, 10th ed., p. 227, it is said: "Where the object of the contract is an unlawful act, the contract is void, though the parties may not know that their act was illegal or intended to break the law." And on p. 228: "The general rule needs modification where only one of the parties has the intention to break the law. Such a case could only arise where the contract was to do a thing innocent in itself but designed to promote an illegal purpose." And again: "Where the innocent party becomes aware of the illegal purpose of the transaction before it is completed or while it is still executory, he may avoid the contract."

Before considering, however, the question whether the contract was voidable at the option of the company, there may still be question whether, having found as a fact that the defendant company had not intent or purpose that the property should be used for an illegal object, the principle of Clarke v. Hagar covers this case absolutely, or whether there may not be some other ground for declaring the contract absolutely void from the beginning. The only other possible ground for such a conclusion, it seems to me, lies in the bare assertion that a contract of insurance upon property which is being used for any illegal purpose whatsoever is void as being contrary to public policy. Now I can find no such general rule of law laid down anywhere in any English or Canadian precedent. Anson on Contract, p. 212, says: "We may say, then, that the policy of the law has, on certain subjects, been worked into a set of tolerably definite rules,

but no Court has any longer the power to extend its operation."

The general principle of public policy was discussed at great length by the House of Lords in Janson v. Dreifontein Consolidated Gold Mines Ltd., [1902] A. C. 484. In that case Lord Davey said (p. 500): "Public policy is always an unsafe and treacherous ground for legal decision." And Lord Halsbury said (p. 491): "I do not think that the phrase 'against public policy' is one which in a Court of law explains itself. It does not leave at large to each tribunal to find that a particular contract is against public policy." And again, on the same page, he said: "I deny that any Court can invent a new head of public policy." A perusal of the judgments delivered in that case is quite sufficient to indicate how dangerous it is to attempt to widen by inference and analogy the principle that a contract is void as being contrary to public policy. The case is also sufficient to shew how impossible it is to take the cases upon marine insurance as precedents to guide us in the present instance. That the assisting of the King's enemies is illegal, and that no contract which in any way promotes intercourse with them will be enforced, is the principle upon which the marine insurance cases were decided. These constitute one head of public policy as indicated by Lord Halsbury: but I think I should be inventing a new head of public policy, which has no where, so far as I can find, been laid down by any Court in England or Canada whose decisions are binding upon me, if I were to say that an insurance policy upon a building which is being used as a house of ill-fame is ipso facto void on the ground of public policy. To say this is to go much farther than to say that a contract which has for its object an illegal purpose, or a contract both the parties to which had an illegal intent and purpose in view when entering into it, is illegal and void. The latter is no new "head of public policy," but, on the contrary, has long been recognised. But, if an insurance policy upon a house of ill-fame is void on the ground of public policy, quite regardless of the intent and purpose of the company, why should not a contract to build a house which is to be used for that purpose be also void, quite regardless of the intent or purpose of the contractor who builds it? The moment the intent and purpose to carry out an illegal object disappears in the case of one party to the contract, then it seems to me this well-known

head of policy to which I have referred is no longer applicable. The contract cannot be declared void from the beginning, but, at most, and perhaps only, voidable at the option of the innocent party.

The case of Feret v. Hill, 15 C. B. 207, seems to me to raise considerable doubt whether there is even a right to avoid the contract in such a case. The owner of certain premises had granted a lease of them. The lessee at the date of the lease mentioned intended to use the premises and afterwards did use them as a common brothel. The lessor then forcibly expelled the lessee. The lessee brought ejectment and succeeded. There was no knowledge even on the part of the lessor of the lessee's intention in taking the lease. The case would, it seems to me, be an exceedingly strong one in the present plaintiffs' favour were it not that the Court was apparently much influenced by the strictness of real property law. The lease granted an estate, and the estate passed, so the Court said, quite regardless of the lessee's intention in the matter. And yet there are expressions which shew that the Judges looked on the lease as a contract. Jervis, C.J., said: "I do not think that the immoral intention in the mind of the plaintiff at the time or the immoral use made by him of the premises after he got possession can have any effect at all upon the validity of the contract." Again he said: "So in Gas-Light Co. v. Turner, 7 Scott 779, there was not, as here, a mere intention on the one side to do an illegal act, but the lease which the plaintiffs were seeking to enforce was executed by both parties for the express purpose of carrying into effect something which was prohibited by law." These passages, I think, bring out very clearly the distinction to which I am now directing attention. Maule, J., used similar language, and also said: "As to the plaintiff's intention at the time of the contract—I think neither that nor the use he made of the premises subsequently will avoid the lease. The plaintiff was to have some locus pœnitentiæ; it is not to be presumed that he will continue to do that which is unlawful." And Crowder, J., said: "No intention existing in the plaintiff's mind could make the contract void. He might have repented."

This case seems very strong in the plaintiffs' favour, and the only thing that weakens its support to them is the fact that the Court, being a Court of law, considered that the

estate in the land had passed to the lessee, and seem to have been mainly influenced in their decision by this consideration.

The farthest I can feel safe in going along the line of public policy is to say that this contract of insurance was voidable at the option of the insurers upon their discovering the illegal purpose for which the property was being used. They, however, knew of this purpose in the first instance, and yet accepted the premium and issued the policy. Had the fire occurred while the illegal occupancy continued, it might be that, even in spite of their previous knowledge, the company might have refused to pay. Even aside from the existence of intent and purpose in the mind of the insurer such as I have previously discussed, it may be that public policy might lead the Court so far as to say that an insurance policy upon property which is being illegally used at the time of the loss should not be recoverable in any case. I am not prepared to say that the Court should even go that far, where the insurer, while not sharing in the illegal intent, nevertheless knew of it and yet accepted the premium, allowed the policy to stand, and failed to exercise his right to declare it void.

But this I feel fully safe in saying—that I have not discovered any well-known rule of law resting upon public policy declaring an insurance upon all property being illegally used at the date of the policy absolutely null and void, quite regardless of the intent and purpose of the parties. In the absence of illegal intention, the most that can be said is that the contract is voidable at the option of an innocent party. In this case the illegal use ceased long before the loss occurred. There was here, I think, as in Feret v. Hill, a "place for repentance." The illegal use having ceased long prior to the fire, I am quite unable to conceive how the Court can be said to be assisting in carrying out any illegal object if it declares this present policy to be binding on the company.

For these reasons, I think the first contention of the defendants fails.

With respect to the contention that the property was unoccupied at the date of the fire, it is sufficient to say that the evidence shews that just such an occupancy as the company must have anticipated did exist up to within 3 or 4 days of the fire. There is no evidence that the property re-

the articles specified in it—which, I think, is the subject matter of the judgment; not the mere balance of the account or such articles as may be found by the application of the rules as to appropriation of payments not to have been paid for. This interpretation seems to me to be founded in justice. The rights of third parties obviously cannot be affected.

In the result, I hold that all books listed in the account except those specifically paid for are liable to seizure under the plaintiffs' execution.

ALBERTA.

BECK, J. DECEMBER 4TH, 1909.

TRIAL.

IMPERIAL BANK OF CANADA v. GEORGES & SON.

GEORGES & SON v. KIDD.

Chose in Action—Assignment of—"Lien Note"—Absolute Assignment—Notice to Person Liable to Pay—Letter—Sufficiency—Pleading—Contract—Sale of Horse — Representation — Pedigree — Warranty — Damages — Set-off.

The first action was brought upon a "lien note;" the second for the return of two other lien notes and for damages. The actions were consolidated and tried together.

G. H. Ross, for the Imperial Bank of Canada and Kidd.

W. E. Payne, for Georges & Son.

BECK, J.:—The plaintiff bank sue on a "lien note" made by Georges & Son, payable to Kidd or order, for $750. The statement of claim puts it first as a promissory note, alleging indorsement to the plaintiffs, alternatively as "an instrument in the nature of a lien note," alleging an assignment in writing and express notice thereof in writing to the defendants by letters dated the 13th April, 1908, and the 30th May, 1908.

I hold the instrument in question to be not a promissory note, but a "lien note," and therefore subject to the provisions of our statutory law relating to assignments of choses

in action, namely, the Judicature Act, C. O. 1898 ch. 21, sec. 10, sub-sec. 5, and the Statute Law Amendment Act, 1907, ch. 5, sec. 7, sub-sec. 3, the latter enactment requiring in effect that in order to entitle the assignee of a chose in action to sue without joining his assignor, he must (1) have an absolute assignment, and (2) give express notice in writing to the party liable to pay.

The lien note was assigned by the payee, Kidd, to the bank by a memorandum attached to it, reading as follows: "For value received, I assign and transfer the within note and contract and guaranty indorsed thereon to the Imperial Bank of Canada, and waive presentation, notice of non-payment, and protest, and guarantee the payment of the debt represented thereby."

It was shewn that the bank in fact held the instrument only by way of collateral security. This fact does not prevent the assignment being, as I hold it is on its face, an absolute assignment within the above mentioned statutory provision.

The only notice of this assignment proved to have been given by the bank to Georges & Son is a letter from the bank's solicitor addressed to them as follows: "Your promissory note in favour of W. C. Kidd for $750 and interest has been forwarded to me for collection on account of the Imperial Bank of Canada. The amount due appears in the memo. below, which kindly let me have at once and save further expense. In case you refuse payment, you might let me have the name of your solicitor whom you will authorise to accept service of a writ when same is issued."

With some hesitation, I hold this to be an "express notice in writing" of an "absolute assignment" of the lien note. The word "express" designates the character of the notice. Was it notice of an assignment?

It certainly is not necessary in the notice of assignment to set out the assignment verbatim. It would be enough to say, "I have an assignment (of the liability I ask you to pay)." In the present instance the party giving the notice says—not in so many words, but in effect: "I am the solicitor for the Imperial Bank of Canada; I now have in my possession as agent for the bank, who are the holders of it, a promissory note made by you, payable to W. C. Kidd, for $750 and interest. For the bank I demand payment of it from you."

There was no "promissory note" answering this description. There was only the "lien note" referred to. As a matter of law, there is only one method by which the bank could have acquired the legal—as distinguished from the equitable—right to recover the amount of the lien note from the maker, namely, by an express assignment in writing. Were the assignment only equitable, the bank could not recover without making the assignor a party.

With regard to the necessity to state the facts in pleading, the rules before the Judicature Act were substantially the same as laid down by that Act. At common law the rule was stated to be: "Facts only are to be stated and not arguments or inferences or matters of law;" and in equity: "Facts must be stated and not the law or presumptions of law."

To these rules—virtually one—there was an exception which doubtless still exists, namely: "Where the facts involved in a conclusion of law are reasonably certain, so that it can only be made out by one set of facts, it will be sufficient, so far as the Court is concerned, that such conclusion be stated without the facts, for it will be intelligible without more:" Lewis's Equity Drafting, pp. 12, 63.

The statement that the bank were the holders of the lien note, which, prima facie, means the holder by legal title, is a statement of a conclusion of law which can be made out only by "one set of facts," namely, an express assignment in writing, and therefore is a sufficient statement of that fact. It seems to me, too, that in the case of an ordinary book-debt, if a third party were to write to the debtor: "I am now the owner of all A. B.'s book accounts; among them I find one against you amounting to $, which I ask you to pay to me at once;" that would be, for the like reason, a sufficient express notice of the assignment of the debt.

I therefore hold that the plaintiff bank were entitled to sue upon the lien note for $750.

Next it will be convenient to decide what was the contract between Kidd and Georges & Son.

Georges & Son gave Kidd three lien notes, one for $750, one for $250, and one for $500; they are all in the same form with the exception of that for $500, which contains the special provision which I shall set out. These lien notes were given for a "Percheron stallion." The special provision is as follows: "It is well agreed that this note will be

void and given back if W. C. Kidd fails to provide Georges & Son with the necessary papers (pedigree) to get a pure bred certificate from the Provincial Government of Alberta before the last day of December, 1907: W. C. Kidd further agrees that if such papers are not forthcoming before the 15th day of May, 1907, the sum of $200 will be taken off this present note."

The stallion in question was bought by Kidd in Ontario for $425. It seems that the laws in Ontario with reference to registration of stallions are either less stringent or admit of more classes than the laws of Alberta: the (Alberta) Horse Breeders Ordinance, ch. 23 of 1903, 1st session. Under this statute registration is obtainable only for one of three classes, namely, "purebred," "grade," or "crossbred."

The evidence satisfied me that the animal in question was sold as a purebred Percheron. Apart from the oral evidence, this is reasonably clear: (1) from the special clause already quoted from the $500 lien note; (2) from the fact that Kidd insured the stallion as "Romulus II., foaled 1903, valued $1,500;" and (3) from the card issued by Kidd and sent to Georges & Son, commencing: "Percheron stallion: Romulus Second: Romulus Second" (here follows a blank made by the erasure of a number) "sired by Young Romulus 7270 by Romulus 873875, registered in the Percheron Stud Book of France," &c.

Assuming that the horse was registrable in Ontario as a Percheron, the sale having been made in Alberta to one residing in and intending to use it in Alberta, I think the seller must be taken, in the absence of evidence to the contrary, to have used the word "Percheron" as understood in Alberta. Interpreting the special clause in the light of the evidence as to the surrounding facts and circumstances, I find that it was not intended to exclude the condition that the horse was in fact a purebred Percheron, but that both parties believed it to be such, and it was a question whether it was practicable to obtain such evidence of it from "the Stud Book of France" and otherwise as to procure a certificate to that effect from the Provincial Department of Agriculture, it being estimated that, inasmuch as, in default of such a certificate, the horse could be considered only as a "grade" stallion, the loss to the purchaser in one season would approximate $500. I draw the inference from the evidence that the horse is not in fact purebred, and, there-

fore, that Georges & Son are liable, having retained it, to pay only its real value in Alberta as a grade stallion, and this I find to be $400.

Some time before December, 1907, Kidd, having failed to procure the necessary evidence of breeding, returned the $500 lien note. In the second action, that of Georges & Son against Kidd, a return of the two other lien notes is asked, but it neither is alleged nor proved that Georges & Son offered to return the animal. Damages are also claimed. The $250 lien note is held by a third party—the Merchants Bank of Canada.

In the result, Georges & Son are liable to pay, of the $1,000 represented by the $750 and $250 lien notes, $400. The Imperial Bank having sued for the $750, and the Merchants Bank not having sued for the $250, the defence was raised to the former and not to the latter, which will be recoverable in full. The difference required to make up the $400, namely, $150, with interest according to the terms of the lien note, the Imperial Bank are entitled to recover.

There will be judgment for the Imperial Bank of Canada against Georges & Son for $150, with interest at 8 per cent. per annum from the 6th April, 1907, to the 1st May, 1908, and at 10 per cent. per annum from the 1st May, 1908, to this date, with District Court costs, without set-off.

There will be judgment for Georges & Son against Kidd, reciting the facts and declaring that the plaintiffs have been found to be entitled to damages to the amount of $600, and that that amount is satisfied by having been set off against the claim of the Imperial Bank, and Georges & Son will have their costs of action against Kidd.

ALBERTA.

STUART, J. DECEMBER 11TH, 1909.

TRIAL.

GRAND TRUNK PACIFIC R. W. CO. v. VINCENT.

Railway—Contract for Sale of Land to Company—Specific Performance—Plan of Subdivision—Registration—Cancellation—Highway—User—Dedication—Way of Necessity—Misrepresentation—Board of Railway Commissioners—Land Titles Act—Railway Act, sec. 88—Easement—Compensation.

Action for specific performance of an agreement for the sale of land and for cancellation of part of a registered plan.

O. M. Biggar, for the plaintiffs.

E. B. Edwards, K.C., for the defendants.

STUART, J.:—Some time prior to September, 1905, one John Hagman was the registered owner of the whole of the north-west quarter of section 18 in township 53, in range 24, west of the 4th meridian. Prior to that date Hagman had registered in the land titles office at Edmonton a plan of subdivision of this quarter section, which was numbered 495 R, and shewed the whole of the quarter section cut up into blocks varying in size from 20 acres to 1 acre, but did not shew any streets upon it at all. Subsequently and during the months of September, October, and November, 1905, Hagman entered into agreements of sale with various purchasers of different lots and blocks shewn upon this plan, and these agreements, after specifying the parcel agreed to be sold, all contained this clause: "Subject to any streets or right of way that may hereafter be laid out on such acres (or lots) in order to provide exit to streets south and east of this property." The transfers made in pursuance of these agreements were not proven, but the certificates of title issued did not in many cases contain any reservation of a street or right of way. I gathered also from Hagman's evidence that in several cases he had entered into agreements of sale which contained no reservation. One of the agree-

ments containing this reservation was entered into with one Narcisse B. Champagne, and covered lots 5, 6, and 7 in block 34 according to the plan mentioned. Champagne sold lots 6 and 7 to the defendant Peter Vincent, and the latter received his certificate of title for these lots, without any reservation as to streets, on the 19th February, 1908. The defendant Louis Simon had purchased from Hagman, lots 8, 9, and 10 in block 34, immediately to the north of lots 6 and 7, and the defendant Armand Marsan had purchased blocks 32 and 33, which, according to Hagman's plan, lie immediately to the west of and contiguous to block 34, without any street between them. On the 8th October, 1908, Simon and Marsan went to see Vincent at his residence at Diligence, a place some 30 miles from Edmonton, and asked him if he was willing to give 33 feet for a street. He answered "yes." Marsan says that he asked Vincent if he (Vincent) was willing to sign the agreement and give 33 feet for a street, and that Vincent answered "yes." As far as I could make out from the evidence of Vincent, Marsan, and Simon, it does not appear that at this verbal conversation there was any mutual agreement entered into whereby Vincent agreed to give 33 feet for a street on condition that the others did the same. I did not observe in the evidence of Marsan anything more explicit and definite than that which I have already quoted. As a result of the interview, however, Vincent signed a power of attorney constituting E. B. Edwards and Louis Madore, both or either of them, his "true and lawful attorney or attorneys for me and in my name to sign and execute any plan or plans that may be required for the purpose of subdivision of blocks 32 and 33 on the Hagman estate, and the laying out of a street on the east side of such blocks, of the width of 66 feet, 33 feet in width of such street to be taken off the westerly ends of my lots, being lots numbers 6 and 7 in block 34, according to plan 495R., in the Hagman estate, and to do all acts that may be necessary to complete and register such plan." Simon says that Marsan read this power of attorney to Vincent before he signed it.

The next day, viz., the 9th October, 1909, one Bouchier, the purchasing agent of the plaintiffs, went to see Vincent, and, after some discussion, Vincent signed an agreement to sell lots 6 and 7 to the plaintiffs for $1,200. Vincent agreed to give a clear title, and the money was to be paid in 30

days. Between the 8th and the 20th October Marsan and Simon in person and Vincent and the defendants Alphonse Bois, Clovis Girouard, and Hortense Girouard, by their attorney Louis Madore, joined in the execution of a plan shewing a survey of streets in blocks 26, 27, 32, 33, and 34 according to plan 495R., which former plan was registered on the 20th October as plan 6160V., and shewed a street called Chicago street, taking 33 feet off the easterly side of block 33, and 33 feet off the westerly side of lots 6, 7, 8, 9, and 10 in block 34. This street did not extend further south than lot 6, and the owner of lot 5 did not join in the plan. According to the plan, Chicago street is absolutely closed at both ends. On the south at least it is closed as to the easterly 33 feet by the omission of the owner of lot 5 to join in the plan, and as to the westerly 33 feet by a piece of land which, according to the map filed in connection with the orders of the Railway Board, seems to be 37 feet 4 inches in width, running east and west across block 32. I gather from the evidence of Hagman that the northerly 16 feet 4 inches of this strip was sold at some time or other by him to Marsan, without any reservation as to a street. Marsan did not get his title to this strip until August, 1909, a time subsequent to the filing of plan 6160 V., and to the commencement of this action. Upon plan 6160 V., this strip is not called a street; there is nothing to indicate what it is supposed to be. It is apparently separated from Chicago street by a clearly defined boundary, and I cannot, therefore, conclude that the easterly 33 feet at the end of this strip was intended to be included in Chicago street at all, particularly when the registered owner did not join in the plan. That being so, Chicago street, as shewn on plan 6160 V., is effectually closed to the south so far as any attempt at dedication proven in this case is concerned. On the 15th October, 1908, this plan 6160 V. was approved by the municipal authorities of Edmonton, and on the 20th October, 1908, it was duly registered in the land titles office. The approval of the commissioners was given in pursuance of a general by-law of the city dated the 14th May, 1907, referring to subdivisions in the city. The city never expended any money in improvements on Chicago street, and in June or July, 1909, rejected, an application to have the streets shewn on plan 6160 V. formally adopted and accepted as streets by the city, the reason being, according to the evi-

dence of the commissioner Mr. Butchard, that the city corporation were not accustomed to adopt streets by by-law, and also because, under the terms of the admission of the land in question into the city, no local improvement taxes could be imposed for 3 years hence.

On the 20th November, 1908, Messrs. Henwood & Harrison, as solicitors for the plaintiffs, wrote to the defendant Vincent inclosing a transfer of lots 6 and 7 for him to sign, and telling him that the money was ready for him as soon as he signed the transfer. Vincent came to Edmonton on the 24th November, but apparently did not bring the transfer. He went to the office of Henwood & Harrison and saw Mr. Harrison. The latter prepared a new transfer, and Vincent, who was accompanied by Simon as interpreter, executed it. He was told that he would have to wait until it was ascertained that the title was clear before he would get his money. On examining the title, Mr. Harrison discovered the registration of plan 6160 V., shewing 33 feet taken off the west end of lots 6 and 7 for a street. When he saw Vincent next day, Harrison told him the money could not be paid on account of the existence of this plan, and, after tearing the transfer, returned it to Vincent.

The plaintiffs are a railway company authorised by statute, 3 Edw. VII. ch. 122, to construct a railway from Winnipeg to the Pacific Ocean via Edmonton. The plaintiffs on the 6th March, 1908, filed a location plan for a branch line under the Railway Act in reference to section 19, which included the Hagman property. In two other actions between the defendants Girouard and Marsan respectively and the plaintiffs, this plan was declared to be defective and not sufficient under the Act to authorise the company to proceed with expropriation proceedings. On the 19th February, 1909, an order was made by the Board of Railway Commissioners, sitting at Edmonton, permitting the plaintiffs to take for the purpose of their railway, among other lands, all those parts of lots 6 and 7 in block 34, being the lots here in question, as shewn in yellow on plan attached to the file and appearing on the book of reference. No reference was made in this order to streets, but the order was not to "affect or in any way prejudice the rights of any of the parties in any litigation now pending." This order was registered in the land titles office on the 1st April, 1909, and I gather, from what the official witness from the registry

office said, that there was a plan accompanying this order, though I do not find it among the exhibits. On the 6th July, 1909, the Board of Railway Commissioners made another order, but, upon perusal of it, I cannot see that it refers to block 34 at all, or how it can be considered material to an action which deals only with lots 6 and 7 in that block. The owner of lots 6 and 7 was apparently represented on the application for the order of the 19th February, 1909, but this seems to have been, as far as the evidence goes, the only dealing between the parties until the issue of the writ in this action on the 7th July, 1909.

In their statement of claim the plaintiffs set forth the facts as to the agreement of the 9th October, 1908; they allege that prior to that date no proper plan, profile, and book of reference, shewing the whole of the said lands required for the railway, had been filed as required by the Railway Act, but that the said lands have since been set out and ascertained; they alleged further that the defendants, other than Vincent, had joined in the plan of subdivision shewing the streets, which was registered on the 20th October, 1908, or had purchased lots according thereto; they allege further that they have always been ready and willing to pay the defendant Vincent the sum agreed upon, and have in fact tendered him the same, and they ask for specific performance of the agreement of sale "or" (by which I presume "and" is intended) "cancellation of so much of the said plan of subdivision as shews the said street upon the said lands."

The defendant Vincent (1) denies the making of the agreement alleged; (2) alleges that at that date the plaintiffs had not complied with the Railway Act as to the filing of proper plans, but had filed improper, misleading, and deceptive plans, and were not at the date of the agreement entitled either to commence construction or to procure agreements from the owners of lands for the sale and purchase of the same; (3) alleges that he was induced to enter into the agreement by means of the false representations of Bouchier, who represented that the company were entitled to take and expropriate the lands in question under the Railway Act; (4) denies the tender of the money or the readiness of the plaintiffs to pay; (5) alleges that prior to the 9th October, 1908, he had entered into an agreement with the defendants Marsan, Clovis Girouard, Hortense Girouard, Simon, and Bois, for the laying out of streets upon the pro-

perty in which they were severally interested, and had agreed to dedicate 33 feet off the western end of the lots in question as part of a street and to join in the registration of a plan shewing such street, in consideration of the other defendants dedicating portions of their land as streets and joining in the registration of the said plan, and sets forth the facts as to the power of attorney and registration of the plan; (6) alleges that he is an illiterate man and unaccustomed to business transactions, and not able to converse well in English, and that the agreement was not fully read and explained to him; that he had no independent legal advice; that he had not sufficient knowledge of its contents; and that the agreement is therefore null and void.

The other defendants plead in effect the making of the agreement as to streets, the registration of the plan shewing streets, and the purchase and sale of lots according to it, and they claim priority under the Land Titles Act in consequence thereof.

At the opening of the trial, on the application of the defendant Vincent, I allowed an amendment of his defence which raised the plea that there had been a public highway commonly used by the public along the place in question, and that the defendant Vincent signed the agreement through mistake in so far as the land covered by this alleged highway is concerned.

Plainly the first point to decide is whether, prior to the 9th October, 1908, anything had occurred which restricted in any way the right of the defendant Vincent to deal with the whole of lots 6 and 7. He obtained his certificate of title for these lots on the 19th February, 1908, and the certificate contains no reservation of any easement or right of way of any kind. The original agreement of sale from Hagman to Champagne did indeed contain the very vague and general reservation which I have quoted. But there is nothing to shew that Champagne made any similar reservation when selling to Vincent, or that Vincent in any way assented to such a reservation, or had notice of that contained in Champagne's agreement. Vincent, indeed, says, referring to the agreement which Bouchier got him to sign: "I sold two acres. I had bought two acres and I sold two acres. I cannot say if the street was included, but my idea was that the street was outside the two acres. I did not think I owned the street or that it belonged to me; I thought it

was outside the two acres. . . . I would have told him the streets were to be taken off the lots if I had known they were to be taken off." And again on cross-examination he said: "At that time I did not know the street was to come off my property. I thought it was to the west of my property. I thought the road was left outside of my two acres, and that I had a full two acres. And I said on my examination for discovery that, if it was taken off my property, I did not know how it was fixed."

So far, therefore, as the reservation contained in the agreement with Champagne is concerned, it is clear that this was not binding upon Vincent in any way, and that he had no notice of it whatever. That document may, therefore, be set aside as of no assistance to the defendant.

With respect to the amended defence that a public highway had been created by public user, I am of opinion that this cannot be sustained upon the evidence. There was clearly no such general user by the public as would, under the authorities, constitute the place in question a public highway. At the most the strip in question, viz., 33 feet on the west side of lots 6 and 7, can only be said to have been used by Simon, and possibly Marsan. Even the user by them is doubtful, according to the evidence. There was some evidence of waggon tracks, &c., but whether they were on the western 33 feet of Vincent's land or further west on block 32 or 33 is not at all clear. In any case, the user was not by the general public, but by, at most, 2 or 3 individuals. Such a state of facts cannot constitute a public highway. There was at one time some doubt as to whether a cul-de-sac open only at one end could ever be a highway. It seems to be now settled that, in certain circumstances, it can be so: Pratt & MacKenzie on Highways, 15th ed., p. 6; Bourke v. Davis, 44 Ch. D. 123. But certainly, where the place is closed at both ends, there can be no doubt that there cannot be a highway: Attorney-General v. Mayor, &c., of Richmond, 20 Times L. R. 131.

It was also argued that there must be a way of necessity in the circumstances. This contention was not raised. I presume, on behalf of Vincent, because he was the owner himself of the 33 feet in question, and a way of necessity for him must surely be over, not his own land, but over some other person's. The contention must have been on behalf of the defendants, Marsan, Bois (or Bougie), and Simon.

Now it is true, I think, that in the case where the owner of an estate parts with such portions of it as will render the part retained useless unless he can have access to it, there will be a way of necessity over the part granted, and it is also possibly true that where the grantor, after making the grant, subdivides the portion retained and parcels it out to different purchasers, each of these different purchasers may be entitled to a way of necessity in order to get out to a public highway. See Washburn on Real Property, vol. 2, pp. 320 et seq. But such a way of necessity must be in some way fixed and located before it can be said to attach to any particular piece of land. The agreement with Champagne did indeed say that the conveyance was to be "subject to any streets or right of way that might thereafter be laid out on said lots in order to provide exit to streets south and east of the property." But up to the time that Vincent acquired the property no such street or right of way had been laid out. No definite locality had been determined. I therefore cannot see how Vincent's certificate of title can be said to be subject to the implied reservation referred to in sec. 43 (g) of the Land Titles Act, viz., "any right of way or other easement granted or acquired under the provisions of any Act or law in force in the province." That provision will be quite onerous enough, it seems to me, even when limited, as I think it must be, to a right of way already definitely located and fixed in some way, both as to place and as to the persons entitled to it. To hold that the clause can make Vincent's certificate subject to an absolutely indefinite easement, indefinite as to place and indefinite as to the owner or owners thereof, would be extending the Act far beyond what could ever have been intended. This contention, therefore, even if it had been raised on the pleadings, which it was not, cannot, in my opinion, be sustained.

The defendant Vincent also contended that he was illiterate, that he did not understand what he was doing when he signed the agreement of the 9th October. Unfortunately for this contention, his evidence in the box, not merely under cross-examination, when words may possibly have been forced into his mouth that he did not exactly intend to say, but in his examination in chief in answer to his own counsel, is practically conclusive proof that he really intended to do just exactly what he did do when he agreed to sell all lots 6

and 7 without any reservation for a street. I have already quoted this evidence, and need not further refer to it.

The defendant Vincent was quite apparently eager and anxious to get his money, and would, in my view, certainly have taken it and been quite satisfied if the trouble as to plan of streets had not stood in the way of giving it to him. The suggestion that he was misled by misrepresentations as to the power of the company to take his land is, I think, rather absurd. It is practically tantamount to saying that the company's representative stood over him with a club and by force compelled him to sign something which he would not otherwise have signed, that is to say, in effect robbed him on the open highway. The evidence is quite insufficient to justify me in making any such finding; and as to a misrepresentation of fact as to the company's power, if there was any representation as to this at all, which I very much doubt, and even if we admit that at that date—9th October, 1908—the company had not yet received from the Board of Railway Commissioners power to take the whole of his lots, in which case the representation, if made at all, would doubtless have been untrue, I cannot believe that Vincent was really influenced by this representation in deciding to sell his land for $1,200.

I conclude, therefore, that on the 9th October, when he signed the agreement, Vincent had a complete right to sell his lots without reservation, and that he did then enter into an agreement to sell them for the sum of $1,200. As to any verbal agreement with Marsan and Simon as to giving 33 feet for a street, I am quite unable to find upon the evidence that such a verbal agreement was made. Vincent's own evidence to which I have referred is absolutely at variance and inconsistent with the theory that any such agreement was then made. He himself pleads his own illiteracy. The evidence is, in my view, overwhelming, not that he misunderstood the agreement of the 9th October, but, on the contrary, that he quite misunderstood what he was doing when he signed the power of attorney.

However, he did sign the power of attorney, as I have quoted it. There remains, therefore, the much more difficult question whether, Vincent having signed it as he did, and Edwards and Madore having dealt with the other defendants who signed the plan, and having led them into signing it and registering it in the land titles office on the faith

of the apparent authority given by Vincent in the power of attorney, and still other defendants having purchased property upon the faith of this registered plan, the plaintiffs are in a position to enforce specific performance of the agreement, not as against Vincent, as to which I think there can be no doubt whatever, except such as may arise under the construction of sec. 188 of the Railway Act, but as against such other defendants.

This question can be disposed of more conveniently by first inquiring whether, aside from the execution of the agreement sued upon, the place in question ever became a public highway or street in consequence of the filing of the plan. In my opinion, it did not. As I said in the beginning, it does not appear that there is any exit whatever provided for from the places denominated streets in the plan; that is to say, there is no passage whatever whereby the public generally could pass from any ordinary public highway into and upon these places. If there had been such means provided, it is possible that the registration of the plan, after being approved by the municipal authorities, and the selling of lots according to it, might have constituted these places highways, if not in the sense that the municipality would be liable to repair, at any rate in the sense that the adjoining owners and purchasers would have had a right as against each other and as against the authors of the plan to have the places kept open for them and the public generally to pass over without restriction. But certainly, where there is no exit or entrance at either end, there cannot be a public highway. Bailey v. Jamieson, 1 C. P. D. 329, is clear authority for this; and I am thus relieved from the necessity of considering the effect which approval of the municipal authorities would have had, had there been an exit provided. No exit has so far been provided in any direction, and, so far as the evidence goes, it does not appear to me that any particular owner is even legally bound to provide one.

In my opinion, however, the effect of the execution and filing of the plan and the sale of lots according to it is to give to the other persons who joined in the plan, and to the purchasers from them, a certain right over the places marked on the plan as streets. This right is not a public right but a private one, that is, a right exercisable, not by the public generally or by any public authority, but by these few individuals only, as against each person who joined in the execution and register-

ing of the plan, to use so much of that person's property as is shewn on the plan as part of a "street" for the purpose of passing over it, or as it is called an "occupation road." See Pratt & MacKenzie, p. 1. This is simply in the nature of a private easement, of a private property right, which may be enjoyed in connection with the lands owned by these individuals and as appurtenant to them.

This being so, it becomes quite unnecessary, in my view, to inquire further as to the effect which the execution of the power of attorney in favour of Edwards and Madore, and the subsequent joining by them as Vincent's attorneys, may have had upon the agreement of the 9th October. It does not appear from the evidence whether or not the remaining authors of the plan and the purchasers of lots according to it had notice of the execution of the agreement of the 9th October. Had this been material, there would have been a question as to the party upon whom the burden of proof would have lain as to the existence or non-existence of such notice. But I am relieved, I think, from the necessity of giving any consideration to this question by the terms of sec. 188 of the Railway Act. If the plaintiffs have any right to enforce the agreement at all, it can only be by virtue of that section.

It reads as follows: "Any contract or agreement made by any person authorised by this Act to convey lands, either before the deposit of the plan, profile, and book of reference, or before the setting out and ascertaining of the lands required for the railway, shall be binding at the price agreed upon, if the lands are afterwards so set out and ascertained within one year from the date of the contract or agreement, and although such lands have in the meantime become the property of a third person."

In this last clause there is no limitation inserted as to notice. I am unable for myself to discover what other purpose it could have been intended to serve if it were not to protect the company's agreement as against any subsequent purchaser, even without notice, and even if he has secured a registered conveyance, and thus become the absolute owner of the property. Apparently such a purchaser is left entirely to his right against the purchase money payable by the company, and, in case of deficiency, to his right to damages against his vendor. Section 213 does not exactly touch this

case, because it refers merely to lands taken without the consent of the owner, that is, under the compulsory power given by the Act.

The single point remaining is whether, in the circumstances proven, the plaintiffs are entitled to say that the agreement is valid and binding upon Vincent. It may be true that the company had not within a year made a deposit of a proper plan, profile, and book of reference, as set forth in sec. 188. But that is not the condition specified upon which the agreement is to become binding. The condition is, "If the lands are afterwards so set out and ascertained within one year from the date of the agreement." Now, I cannot see how it can be contended that these words merely mean the deposit of a proper plan, profile, and book of reference, because in the former part of the section the deposit of the plan, profile, and book of reference is clearly and sharply distinguished from the setting out and ascertaining of the land required. Why should that distinction be suggested unless it is intended that by the latter words something different is to be understood? I can find no explanation or interpretation in the Act itself of this expression. I must, therefore, take it as I find it and give to it the meaning which, according to the natural and grammatical reading of the words, it expresses. In my view, it means the clearly defining and establishing in some way, not of all the other land which the company require, but of the portion of the lands referred to in the agreement itself, which are required, and this in such a way that the proposed vendor shall be able to inform himself of it. This, I think, upon the evidence, was done by the plaintiffs within the year. The company were authorised by the order of the Board of the 18th February, 1908, to construct a branch line of their railway through the north-west quarter of section 18, and that order stated that the width of the branch line right of way was to be not more than 100 feet. This order was filed in the registry office. The order of the 19th February, 1909, granted liberty to take certain portions of lots 6 and 7 in block 34 shewn in yellow on a plan attached. This plan shewed a red or purple strip, which is denominated on it a branch line. It is shewn to be 100 feet in width and to pass through lots 6 and 7. The yellow parts cover the remaining part of lots 6 and 7 not included in this 100 feet strip. This order and plan were registered in the registry office, and were available to the vendor for examin-

ation. Upon these facts I think it was clearly set out and ascertained that the company required the whole of lots 6 and 7 for their branch line. It may be that sufficient was not done to authorise the company to exercise their compulsory powers with respect to their branch line. But we are not concerned with that question here. There is no doubt that there was within the year a sufficient ascertaining and setting out of the portions of lots 6 and 7 required for their branch line to make the premature agreement with Vincent a valid and binding one. I may add that even the agreement itself apparently sets out and ascertains the lands required. It is not a sale of such portions of lots 6 and 7 as the company require at so much per acre, but of the whole of the lots at a fixed sum.

I think, therefore, that the plaintiffs are entitled to enforce specific performance of the agreement as against Vincent, and to ask as against the other defendants for a cancellation of so much of the plan 6160 V. as refers to lots 6 and 7 in block 34, and there will be judgment accordingly. The remaining defendants are, I think, entitled to compensation out of the purchase money for their loss of their interest or easement in lots 6 and 7, but that is a matter to be settled betwen themselves, and need not be further dealt with here.

The plaintiffs are entitled to their costs of the action as against all the defendants.

SASKATCHEWAN.

OUSELEY, DIST. CT.J. OCTOBER 14TH, 1909.

DISTRICT COURT.

MORRISON v. BRYAN.

Animals — Agistment — Lien — Absence of Agreement — Common Law Right—Implication of Law.

The statement of claim in this action alleged that the defendant was wrongfully retaining in his possession 4 cows, describing them, and then alleged that they were the property of the plaintiff, and that the defendant was depriving the plaintiff of the use thereof.

The writ of summons was issued on the 7th July, 1908, and on the same day the plaintiff issued a writ of replevin, which, however, was not acted on until the 7th November, 1908.

The original defence action was filed on the 21st September, 1908, and alleged that "the cattle referred to were left with him by one A. D. Dunning to be kept for said Dunning by said defendant." Paragraph 2 alleged that "the defendant never knew the plaintiff in the matter, nor that the plaintiff was the owner of the cattle," and further alleged that "the defendant is ready and willing to make whatever disposal of said cattle this honourable Court may direct, but claims against said cattle" the sum of $98. Not a word was said here about a lien upon the cattle, the defendant's interest in the cattle being spoken of as a "claim" only.

The statement of defence was amended on the 20th April, 1909, the defendant being allowed to set up a lien upon the cattle and to increase the amount claimed to $115. The statement of defence was further amended at the trial by allowing the defendant to deny the plaintiff's ownership.

Pickett, for the plaintiff.

Knowles, for the defendant.

OUSELEY, DIST. CT.J.:—The whole question in this action is as to whether the defendant has a lien upon the cattle for their keep, the plaintiff's ownership of the cattle not being disputed at the trial.

I find, on the evidence, that, when Dunning delivered the cattle over to the defendant, the question of a lien on the cattle was not discussed. But the defendant said: "Before Dunning went away in November he promised to get me the money and rid me of the cattle," and the defendant says that this statement, together with the clause in the agreement made between Dunning and the defendant when the cattle were delivered over, that charges against the cattle "were to be paid as killed," constitutes a lien upon the cattle. I am unable to agree to this contention. Dunning may have made both the statements referred to, and still it does not follow that the defendant has a lien on the cattle.

To constitute a lien on any property, there must be a clear agreement for the specific appropriation of that property: see James v. Starkey, 16 Jur. 510.

A lien is the right to retain possession of a thing until a claim be satisfied: Stroud's Judicial Dictionary, p. 1097. In order that a lien may be created by a contract, expressed or implied, it is generally necessary that the language of the contract or the attendant circumstances should clearly indicate an intention of the parties to create a lien upon the specific property: 25 Cyc., p. 664.

Having regard to the definition of a lien as given above, it is clear, I think, from the evidence, that there is not a lien given here. Then the language of the agreement and the antecedent circumstances all point the other way. Then again, the defendant, on his cross-examination by Mr. Pickett, said: "I thought I had a lien against these cattle, not from any agreement with Dunning, but because I was feeding them." In the face of this evidence, and taking all the circumstances into consideration, together with the fact that nothing was said in the original defence about a lien (although that may have been a slip on the part of the pleader), and that there is nothing in the agreement proved which would give the defendant a lien, and the burden of proving that a lien exists being on the defendant, I find that there is no express lien proved.

There is no common law right of lien in agisters: see Beal on Bailment (1900), p. 272.

This is laid down in the principal case of Jackson v. Cummins, 5 M. & W. 342. Parke, B., in that case says (pp. 349, 350, 351): "The general rule, as laid down by Best, C.J., in Bevan v. Waters, Moo. & Malk. 236, and by this Court in Scarfe v. Morgan, 4 M. & W. 270, is, that by the general law, in the absence of any special agreement, whenever a party has expended labour and skill in the improvement of a chattel bailed to him, he has a lien upon it. Now, the case of agistment does not fall within that principle, inasmuch as the agister does not confer any additional value on the article, either by the exertion of any skill of his own, or indirectly by means of any instrument in his possession, as was the case with the stallion in Scarfe v. Morgan; he simply takes in the animal to feed it. In addition to which, we have the express authority of Chapman v. Allen, Cro. Car. 271, that an agister has no lien. . . . I am clear that this agister has no lien, as his case certainly does not come within the general principles which have been established;

in addition to which, such a claim would be inconsistent with the more general right exerciseable by the owner of the cattle."

There remains one other question to be determined, namely, has the defendant a lien by implication of law?

In Kirchner v. Venus, 12 Moo. P.C. 361, at p. 391, Lord Kingsdown says: "No doubt parties who have superseded by a special contract the rights and obligations which the law attaches to freight in its legal sense may, if they think fit, create a lien on the goods for the performance of the agreement into which they have entered, and they may do this either by express conditions contained in the contract itself, or by agreeing that in the case of failure of performance of that agreement, the right of lien for what is due shall subsist as if there had been an agreement . . . . But in such case the right of lien depends entirely on the agreement, and if the parties have not, in fact, made such a contract, it is very difficult to understand upon what grounds it can be implied, or why, upon failure of performance of the agreement which they have made, the law is to substitute for it another and very different contract which they have not made. To use the language of Lord Ellenborough in Stevenson v. Blakelock, 1 M. & S. 543, "where there is an express antecedent contract between the parties, a lien which grows out of an implied contract, does not arise."

The case of Kirchner v. Venus can be put shortly in this way. Where parties make a contract, it must depend upon that contract whether a lien does or does not exist, when the contract made gives no lien. A Court of law will not supply one by implication.

In Fisher v. Smith, 4 App. Cas 1, 12, Lord Selborne said: "As to Crawshay v. Homfray, 4 B. & Ald. 50, and Kirchner v. Venus, 12 Moo. P. C. 361, I understand their principle to be this: that a lien cannot be claimed, so as to intercept the performance of the actual contract between the parties, whether that contract is express, or is to be inferred from a certain course of dealing."

The defendant in this action is in effect asking me to read into the agreement he made with Dunning a term giving him a lien on the cattle. I am satisfied that the authorities are against this, and that, the defendant having made a certain contract with Dunning which did not provide for a lien, I am not permitted by the authorities to infer one.

The defence to this action, in my opinion, totally fails, and there will be judgment for the plaintiff with costs.

SASKATCHEWAN.

TRANT, P.M. DECEMBER 4TH, 1909.

TRIAL.

REX v. RAFFENBERG (No. 1.)

Medicine and Surgery—Saskatchewan Medical Profession Act—Advertising to Give Advice in Medicine—Unregistered Practitioner — Osteopathy — Evidence — Police Magistrate—Jurisdiction—Depositions not Taken before Summons Issued—Criminal Code, sec. 655, Amended.

Information laid by George Burrows, an officer of the Saskatchewan College of Physicians and Surgeons, that Mary Raffenberg, on the 23rd November, 1909, at Regina, in the province of Saskatchewan, did, not being registered under the Medical Profession Act, unlawfully advertise in the Regina "Morning Leader," a public journal, to give advice in medicine for gain or hope of reward, contrary to sec. 64 of the Act, etc.

The case was tried summarily by the police magistrate for the city of Regina.

J. A. Cross, for the informant.

J. F. Frame, for the defendant.

THE POLICE MAGISTRATE:—As regards the question of jurisdiction, because depositions were not taken before issuing the summons, as required by this year's amendment to sec. 655 of the Criminal Code, the section refers to indictable offences only. Even if it were otherwise, I should be inclined to interpret the word "shall" as merely enabling. If it be construed imperatively, it would require more than one police magistrate to get through the work of Regina police court.

The charge is for unlawfully advertising to give advice in medicine—the accused not being registered under the Medical Profession Act. The advertisement does not say one word about giving advice in medicine or anything else; and it seems to me that the defence might very well have

rested there. Mr. Frame, however, for the accused, has raised the whole question whether or not unlicensed persons can practise osteopathy, and, therefore, I am obliged to respect the arguments put forth.

The section in the Saskatchewan Act under which the charge was laid is an exact copy from the Ontario Act. Ontario decisions are, therefore, valuable. A review of the cases cited shews that a person can go to a druggist (who can recommend certain drugs), to a Christian Scientist, an osteopath, a masseur, a medical electrician, an oculist, a chiropodist, a manicurist, and many others; undergo treatment and pay for it; and there is nothing to prevent such practitioners from using linaments, recommending an aperient, open air exercise, a certain dietry, sea bathing, electricity in all its forms, massage, osteopathy, &c. Even if registered physicians practise osteopathy, that does not prohibit other persons from doing the same. Mr. Justice Osler went so far as to say that unregistered persons might visit their patients and charge for the visits. He decided a case upon that point.

The Ontario Court of Appeal in In re Ontario Medical Act, 13 O. L. R. 501, declared that this had been the law in Ontario for a century; and Regina v. Stewart, 17 O. R. 4, decided 20 years ago, was declared by the Court to be established law until altered by the legislature. Mr. Justice Maclaren said that hundreds if not thousands of reputable persons had established themselves in business on the faith of it and under its protection.

There are, however, limits to the rights of unregistered practitioners, and they are sharply defined. There must be no diagnosis by such persons, no advice given, and no prescribing of medicines. Outside of these limits persons may practise as above indicated.

In the present case there was no evidence whatever that any one of these three things was done. All the evidence was to the contrary. It was difficult to imagine Miss Raffenberg advising medicine, when the very advertisement reprobated drugs.

The case is dismissed.

SASKATCHEWAN.

TRANT, P.M. DECEMBER 4TH, 1909.

TRIAL.

REX v. RAFFENBERG (No. 2.)

Medicine and Surgery—Saskatchewan Medical Profession Act—Practising Midwifery — Unregistered Practitioner —Evidence—Isolated Act.

Information laid by George Burrows, an officer of the Saskatchewan College of Physicians and Surgeons, against Mary Raffenberg, that, on or about the 26th August, 1909, at Regina, in the province of Saskatchewan, she did, being a person not registered under the Medical Profession Act, unlawfully practise midwifery on one Mrs. Moore, for hire, gain, or hope of reward, contrary to the provisions of sec. 64 of the Medical Profession Act.

The case was tried summarily by the police magistrate for the city of Regina.

J. A. Cross, for the informant.

J. F. Frame, for the defendant.

THE POLICE MAGISTRATE:—Section 64 is an exact transcript from the Ontario Act, and therefore Ontario decisions on the subject are valuable. It is worth noting that in the Medical Profession Ordinance of the North-West Territories, the corresponding section was also copied from the Ontario Act, but with the word "midwifery" omitted; doubtless, says Scott, J., in The King v. Rondeau, 9 Can. Crim. Cas. 523, 528, because in some of the then sparsely settled parts it would be difficult, and in some cases impossible, to procure the services of a licensed physician as a midwife. This fact is chiefly of historical interest only. It, however, emphasises what the intention of the legislature is. It was contended for the defence that the Act was passed in the interest of the Medical Profession, and not in the interest of the public, a view held by Garrow and Meredith, JJ.A., but opposed by Osler, J.A., and Moss, C.J.O., in In re Ontario Medical Act, 13 O. L. R. 501. I hold with the latter, and indeed I cannot

see how any Act passed by a legislature can be regarded in any other light than as having been passed in the public interest, especially when included in the Revised Statutes. It is clear, then, that the Saskatchewan statute prohibits the practice of midwifery for gain by persons not registered under the Medical Profession Act.

The evidence shews that Mary Raffenberg did attend Mrs. Moore in her confinement, and was paid for her services. For the defence it is contended that an isolated instance is insufficient to prove a "practice." Many cases were cited in support of this view. On examining the references, I note that the point at issue was not precisely the same as in the present case. The point was that in an habitual or continuous course of conduct the defendant was not guilty of a separate offence in attending different persons, but was only liable to one penalty: Apothecaries Co. v. Jones, [1893], 1 Q. B. 89. As Hawkins, J., said, quoting Lord Mansfield, if a tailor sews on the Lord's day, every stitch he takes is not a separate offence.

That is not the question at issue in this case. The question is whether the accused was guilty of a continuous course of conduct that the law forbids. Bearing this distinction in mind, it is in the dicta of the Judges rather than in their decisions that I find guidance. McDougall, Co.C.J., in The Queen v. Whelan, 4 Can. Crim. Cas. 277, 282, says: "I am inclined to think that the two weeks' continuous attendance, viewed in connection with what is shewn to have taken place at the birth of Mrs. Rider's child, and the entire absence of any lawful medical attendant, might possibly support a finding that this was not the mere exercise of a calling on an isolated occasion, but amounted to a practising within the meaning of the Medical Act." In other words, there may be but one patient, yet the acts continuous and numerous. Again, the same Judge in The King v. Lee, 4 Can. Crim. Cas. 416, 419, says: "Evidence of acts of practising antecedent to the date named in the conviction might, no doubt, be given to establish a practising, and possibly evidence of acts of practising subsequent to the date laid in the conviction, but before the date of the information, might be given as establishing, or tending to establish, a practising of medicine." Again, Pollock, B., in Apothecaries Co. v. Jones, already cited, says (p. 91): "The words of the Act appear to me to point rather to an habitual, or, at all events, a continuous,

course of conduct, than to an isolated act as constituting the offence."

Almost all the authorities lay stress upon considering concrete cases only. "Every case," says Osler, J.A. (13 O. L. R., at p. 510), "must be determined upon its own facts and circumstances."

Now what is the evidence? Mrs. Moore says: "Miss Raffenberg treated me leading up to the expected confinement. She had charge of the case from the beginning. There was no arrangement as to payment. The matter was discussed by me and Miss Raffenberg. I asked her to send in her bill. I cannot remember just what she said. She said something about not having made it out. It was $36.50. I think it was $30. I asked her to make out her bill. She did not do it. I asked her again and she said $30."

Mr. Moore, the husband, after stating that he gave Miss Raffenberg $20, and that she was not acting in the capacity of nurse, adds: "It was after the confinement that I first learnt from her own lips that she expected payment. No sum was mentioned. I don't know whether it was full payment or part payment or whether it was for the confinement or other services."

This evidence shews there was a continuous series of acts. The fact that Mrs. Moore was the only person attended does not matter. I cannot imagine clearer language to shew that Mary Raffenberg practised as a midwife for gain without being registered as required by law, and I convict her of the offence charged, and I do order that she forfeit and pay a penalty of $10 to be paid to the Provincial College of Physicians and Surgeons, and pay the informant $3.75 for his costs herein, to be paid forthwith; and, in default of payment forthwith, that she be imprisoned for 14 days.

SASKATCHEWAN.

WETMORE, C.J. DECEMBER 4TH, 1909.

CHAMBERS.

MOOSE MOUNTAIN LUMBER AND HARDWARE CO. v. PARADIS.

Appeal to Court en Banc—Leave to Appeal—Order of Committal for Contempt of Court—Disobedience of Injunction—Necessity for Purging Contempt before Applying to Court—Criminal Matter.

Application by the defendant for leave to appeal from the order of WETMORE, C.J., of the 25th November last, ante 310, ordering the defendant to be committed for disobedience to an injunction order. The facts of the case are fully set forth in the reasons there given.

E. W. F. Harris, Arcola, for the defendant.

P. H. Gordon, Regina, for the plaintiffs.

WETMORE, C.J.:—The application was opposed on the ground that the defendant, having been adjudged guilty of a contempt of an order of the Court, will not be allowed to appeal, at any rate until he has purged the contempt. I have come to the conclusion that the defendant has a right of appeal. I am, however, not very clear that it is necessary for him to obtain leave to do so. Oswald on Contempt, 2nd ed., p. 223, states that it is not necessary; and the Judicature Act of 1894 (Imp.), by sec. 1, paragraph (b), sub-clause (i), provides that leave is not necessary where the liberty of the subject is concerned. (See Ann. Prac., 1910, p. 655.) However, if leave is not necessary, the granting of such leave cannot prejudice the right of appeal, and, as the liberty of the subject is involved, it is better, I think, that I should grant it than put the party to the risk of losing such right.

A number of authorities were cited on the part of the plaintiff in support of his contention, some of which I will refer to. The first case in point of time is Wenman v. Osbaldiston, 2 Brown's H. L. C. 276. In that case the ap-

pellant deliberately omitted to obey the order of the Court, and an order absolute for his committal had been made and a warrant issued. The appellant keeping out of the way, a sequestration was ordered, and the appellant then appealed from all the orders, on the ground that it was unreasonable, for reasons alleged, that his estate should be any longer continued under sequestration. The Court affirmed the orders appealed against, and further ordered a reference to the Master to ascertain the amount due to the respondents, to tax their costs, and that, upon the appellant bringing the money into Court and complying with some other conditions mentioned, the appellant might be at liberty to apply to the Court to discharge the sequestration. I do not consider this a very strong case in favour of the plaintiffs' contention, but, if it is, there had, in that case, been a clear and wilful disobedience of the order of the Court. In Garstin v. DeGarston, 34 L. J. Prob. 45, there had also been a deliberate and wilful disobedience of the order of the Court. The appellant had taken from the petitioner her youngest child, and he was ordered by the Court to deliver it up to her. He refused to do so, and the Court granted an attachment against him, whereupon he left England taking the child with him. He had entered an absolute appearance, apparently by mistake, instead of a conditional appearance, intending to raise the question that the Court had no jurisdiction to entertain the suit, which was for a divorce. He then applied, after the attachment had been issued, to amend his proceedings by entering a conditional appearance in order to enable him to raise the question of jurisdiction. The Court refused the application, holding that, while he set the authority of the Court at defiance, he could not be heard in support of the application. In Cavendish v. Cavendish, 15 W. R. 182, the facts were very similar to those in Garstin v. DeGarston, and the disobedience of the order of the Court had also been deliberate and wilful. This case, however, differs from the last mentioned case, inasmuch as it does not appear that an attachment had been issued against the appellant, (that however is not material to the question I am discussing). The Court held that, being in contempt, she could not be heard on an application for a new trial, on the ground that the decree dissolving the marriage had not been justly made

I can quite understand the principle upon which those cases have been decided. If a party against whom an order

has been made is aware of what the order is and has no reason to believe that it has been abandoned, and so wilfully disobeys it, he is so clearly in contempt that the Court will not entertain an application from him in the suit until he purges that contempt. It is not for a party to say, where the restraining order is clear on its face, that the Court had no jurisdiction to make it; it is his duty to obey the order, and, if the order is not properly made, to appeal against it, but the Court will not submit to having its orders deliberately put at defiance. That may not have been the case in the proceedings now under review. In this case, at the hearing of the application for a committal to issue, it was urged with some show of reason that the defendant, owing to the delays of the plaintiffs in issuing and serving the order for continuing the injunction, had reasonable grounds for believing that the proceedings had been abandoned; and he also set up that he had not been properly served with the order. In this case, therefore, he does not come to the Court deliberately attempting, as in the other cases, to set the order at defiance, and I am of opinion, as at present advised, that, in such circumstances, there is a right of appeal. At any rate I feel that I ought to give him an opportunity of at least asserting that right before the Court of Appeal.

It was also contended, under the authority of O'Shea v. O'Shea, 15 P. D. 59, that the appeal asked for is an appeal in a criminal cause or matter. It seemed to be very clearly laid down by the authorities that an appeal (in the sense in which I am now using the word) cannot be taken in any criminal cause or matter. I am of opinion that this is not an appeal in a criminal cause or matter. In O'Shea v. O'Shea the party against whom the process for contempt issued was held guilty, by his contemptuous act, of a criminal act because he had done something calculated to prejudice the Judge or jury in the trial of an action. Counsel for the petitioner in that case, at p. 61, are reported to have said: "No doubt there are two kinds of contempt of Court; when it is a mere disobedience of an order in the Court in a civil action it is not criminal, and then there may be an appeal; for in that case the attachment only issues to enforce the order in the civil action." And Cotton, L.J., p. 62, lays down the following: "Of course, there are many contempts of Court that are not of a criminal nature; for instance, when a man does not obey an order of the Court made in some

civil proceeding, to do or to abstain from doing something, ... that is really only a procedure to get something done in the action, and has nothing of a criminal nature in it." And at pp. 63-4 he states as follows: "But in the present case the whole proceeding is to punish the appellant for a wrong which he has done, and not to obtain the doing of anything for the petitioner's benefit in the action in the Divorce Division. It was a proceeding, therefore, entirely outside the divorce action, and its object was only to obtain that fair trial to which every suitor has a right." The Court dismissed the appeal in that case squarely on the ground that the contempt of Court was of a criminal nature.

I cannot bring my mind to the conclusion that the defendant in this case committed a criminal act. I would ask (as was done by some of the Judges in a case to which my attention has been drawn), if one was to charge this man with a criminal act, what offence would you charge him as guilty of, and in whom would you lay the right of property? No receiver had been appointed by the Court, and the injunction order itself was obtained for the purpose, as Cotton, L.J., states, of getting something done in the action. The order was one made in a civil proceeding.

I will also refer to Barnardo v. Ford, [1892] A. C. 326. I am of opinion that the ratio decidendi in that case is in accordance with the views I hold, although it may possibly not go so pronouncedly in that direction for which it has been cited in the text books. I will, therefore, give the defendant leave to appeal. I will make an order authorising his release from the imprisonment upon terms which will be found in the order, provided, however, that this last mentioned order will not be held in any way to prejudice him, if he does not comply with the terms I have imposed therein, from making such application for his release from imprisonment as he may be advised.

SASKATCHEWAN.

WETMORE, C.J. DECEMBER 8TH, 1909.

CHAMBERS.

BASHFORD v. BOTT.

Injunction — Motion to Continue Interim Injunction — Practice — Notice of Motion or Summons — Ex Parte Application—Material Facts Withheld—Vendor's Lien—Land Titles Act—Caveat—"Just or Convenient"—Lis Pendens.

Motion by the plaintiff to continue an interim injunction.

Avery Casey, Regina, for the plaintiff.

P. H. Gordon, Regina, for the defendant.

WETMORE, C.J.:—On the 4th November last I granted an interim injunction order restraining the defendant and his agents, etc., from transferring, mortgaging, incumbering, or in any way dealing with the north-east quarter of section 14, township 24, range 28, W. 2, until the 30th November last, and it was further directed by the order that the plaintiff should be at liberty to serve notice of motion on the defendant returnable on the 25th November to shew cause why the injunction should not be continued until the trial or final disposition of this action or further order. Notice of motion was served accordingly, and, when the matter came up in Chambers in response to that notice, objection was taken on the part of the defendant that the proceedings to continue the injunction should have been by summons and not by notice of motion. This objection was founded on Rule 458 of the Judicature Ordinance, which contains the following: "Applications for summonses, rules, and orders to shew cause and applications authorised to be so made by the Rules may be made ex parte. Other motions in Court shall be by notice of motion and other applications in Chambers by summons, except where otherwise specially provided."

In the forms of interim injunction orders given in Seton on Decrees, 6th ed., p. 452, there is a provision for leave to give notice of motion to continue the injunction, similar to

that contained in the interim injunction order granted herein. The practice laid down in Kerr on Injunctions, 4th ed., p. 565, is the same as that given by the form in Seton. In Chitty's Forms, 13th ed., p. 219, however, there is a provision incorporated in the order for leave for summonses to issue. Probably what was laid down in Seton and Kerr had reference to the practice to make applications to the Court to continue the injunction, and not to applications in Chambers. I am of opinion, however, that the practice as set out in the interim injunction order in this case is allowable, and certainly it is more convenient in cases like the present to proceed by notice of motion than it is to proceed by summons. Very frequently, owing to the urgency of the matter, a person applying for an interim injunction order is forced to get his material together in a very hurried manner, and does not purpose to rest his whole case upon the evidence that he is able to produce on the spur of the moment, but intends to rely upon further evidence when the time comes to move or to apply to continue the injunction. If his proceeding, then, is by notice of motion, he can, at the same time that he serves his notice, serve (in addition to that used at the application for the original order) copies of other material upon which he intends also to rely, on his application to continue the injunction. Where the proceeding, however, is by summons, and that summons is embraced in the order for an injunction, or by the leave granted to issue it contained in that order, the plaintiff cannot, without leave of the Court, use any other material except that on which he obtained such order or summons. The Judge in granting an interim injunction can, in my opinion, without any breach of Rule 458, prescribe in the order the method by which the plaintiff may proceed to have that order continued, and when that is done the party can proceed not only under the Rule, but he can proceed by virtue of the leave which the Judge has granted. I am, therefore, of opinion that the proceeding by notice of motion was proper, and the matter came properly before me under the notice.

Another objection raised was that in the application for the interim injunction, which was granted ex parte, material facts had been withheld from the Judge. I will not set out fully what appear to be the facts of this case as set out in the affidavit. It is only necessary to say that, according to the

plaintiff's affidavit and statement of claim, this action is brought, among other things, for the purpose of obtaining a declaration that he is entitled to a vendor's lien in respect to the land above-mentioned, and the fact alleged to have been withheld is that he (the plaintiff) had previously lodged with the registrar of land titles a caveat against any dealing with that land. The caveat and the plaintiff's statement of claim are not based on the same grounds.

The claim sets up a right in the plaintiff on a vendor's lien. The caveat sets up an agreement apparently in writing, giving the date whereon the defendant is alleged to have agreed to execute a mortgage of the property to the plaintiff, or transfer it to him, to secure a payment of $3,121.50. There is a letter from the defendant to the plaintiff, verified by his affidavit, and I presume it probably contains the alleged agreement to give the mortgage or transfer. I am not prepared to say that that letter amounts to an agreement at all: I express no opinion with respect to it. No mention was made of this caveat in the ex parte proceedings for the injunction. It came up on the return of the notice of motion. Am I bound, therefore, by the practice to send this application out of Court because of the withholding of a material fact? Undoubtedly that was the old practice where an injunction order had been obtained, and the defendant applied to dissolve it. In Kerr on Injunctions, p. 586, it is stated: "If on a motion to dissolve an ex parte injunction, it appear that the plaintiff has misstated his case, either by misrepresentation or by the suppression of material facts, so that an injunction has been obtained which would not have been obtained if a more accurate statement of the case had been made, the injunction will be dissolved on that ground alone."

I was under the impression that the rule was more harsh than that. All I can say is, that, if the fact that the caveat in question had been filed had been presented to me on the plaintiff applying for an interim injunction order, I would have granted it. This, however, is not an application to dissolve an injunction: it is an application to continue an interim order. At p. 566, dealing with the practice on an application for an interim injunction order, the learned author says: "Where the application is ex parte, it is necessary that the Court should be informed of all material facts." Fuller v. Taylor, 32 L. J. Ch. 376, was cited for that, but I am not prepared to say that it bears the text out. Wood,

V.-C., in that case (at p. 377), speaking of these interim orders, states as follows: "It is quite true they are not exactly like ex parte injunctions, which put the other side to the necessity of coming here to dissolve them, and in many respects there is a convenience in the present course of proceeding, but, on the other hand, it is necessary that the Court should be informed of every fact whenever an interim order is asked for. This rule ought not, perhaps, to be carried to that extreme degree of nicety to which it formerly was in the case of ex parte injunctions, when the very smallest scrap of paper that was omitted was held almost to disentitle to the injunction."

I can quite understand that cases may arise where material facts have been withheld where the Court would refuse to continue the injunction; for instance, if the Judge is satisfied that fraud had been used or a fact withheld for the purpose of unfairly dealing with or misleading the Court or perverting the course of justice. Section 31, Rule 8, of the Judicature Act (ch. 8, 1907), provides that "an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made."

That provision was contained in all the Ordinances affecting the administration of justice in the North-West Territories, at any rate from the time of the institution of the Supreme Court of the Territories, and was carried forward into the Judicature Act. The provision is taken from sec. 25, paragraph 8, of the Judicature Act, 1873 (Imperial), and the authorities are clear, it seems to me, that these words increase the powers of the Court very materially. In Aslatt v. Corporation of Southampton, 16 Ch. D. 143, Jessel, M.R., at p. 148, lays down the following: "Of course the words 'just or convenient' did not mean that the Court was to grant an injunction simply because the Court thought it convenient: it meant that the Court should grant an injunction for the protection of rights, or for the prevention of injury, according to legal principles, but the moment you find there is a legal principle, that a man is about to suffer a serious injury, and that there is no pretence for inflicting that injury upon him, it appears to me that the Court ought to interfere."

In Cummins v. Perkins, [1899] 1 Ch. 16, Lindley, L.J., at p. 20, lays down the following, dealing with the provision

in the Imperial Act: "But the introduction of that section does not curtail the power of the Court to grant injunctions or to appoint receivers: it enlarges it. It has not revolutionised the law, but it has enabled the Court to grant injunctions and receivers in cases in which it used not to do so previously."

The power of the Court to grant injunctions to preserve property or continue the status quo in respect thereto pendente lite is well recognised, and, being so recognised, the language both of Jessel, M.R., and Lindley, L.J., would apply to an application for an injunction to so preserve property.

It was further urged, however, that there was no necessity for an injunction in this case, because the caveat would serve the purpose, and no notice had been given the plaintiff as provided by the Land Titles Act to remove it. I am of opinion, however, that the obtaining an injunction in this case was prudent. In the first place (without expressing any opinion on the merits of the action), it is clear, in reading the two letters that passed between the parties to this suit, that there was reasonable ground on the part of the plaintiff to bring it, if for nothing else than to endeavour to establish the alleged vendor's lien with respect to the property. And it was of the utmost importance that the defendant should be restrained from disposing of the property. Now, in the meanwhile, all the effect that the caveat has is to prevent the registrar passing a title to a transferee on registering an incumbrance or mortgage by or from a registered owner, without putting a memorandum of the caveat upon the certificate of ownership or other document. And the person purchasing, on taking the mortgage or acquiring the incumbrance, is bound to take notice of what the caveator has claimed in this caveat, and takes his right to the property subject to those rights, whatever they may be. But it seems to me that a plaintiff, under the circumstances in which this plaintiff is placed, has the right to go further, and ask the Court to insist that the property shall be held in the hands of the person against whom he is proceeding for relief until the question involved in the action is disposed of, and not become complicated by being transferred to a third person, possibly involving change of parties to the action and all that. As to whether a lis pendens would suit the purpose, I am of opinion that a lis pendens would be of no use at all. A lis pendens is only notice that an action has been brought.

I consider, therefore, that it is both just and convenient that the injunction order be continued until the trial or final disposition of this action or until further order, and order accordingly. The costs of this application and of the application for the interim injunction will be costs in the cause to either party.

SASKATCHEWAN.

WETMORE, C.J. DECEMBER 8TH, 1909.

CHAMBERS.

CROSS v. CROSS.

Costs—Taxation—Sheriff's Costs of Interpleader—Copy of Examination of Claimant — Counsel Fee on Motion — Items 76 and 77 of Tariff.

Application by Jones, an execution creditor, to review the taxation of the sheriff's costs in an interpleader matter.

E. B. Jonah, Regina, for Jones.

T. S. McMorran, Regina, for the sheriff.

WETMORE, C.J.:—The local registrar taxed to the sheriff $1.10 for making a copy of an examination of the claimant. The sheriff was in no way concerned in any order disposing of the property, but merely laid the application before the Court, with a proper affidavit, and stood aloof. The Judge decided the right of property as between the respective claimants, and I am unable to conceive what necessity there was for the sheriff obtaining a copy of the examination. That item will be disallowed.

The only remaining item is $5 for counsel fee on the argument of the interpleader summons. That requires more consideration.

Item 76 of the tariff relating to counsel fees is as follows:

	Higher scale.	Lower scale.
"Fee on motion of course or in matters not special	$2 00	$1 00

Item 77 reads:—

"Fee on special applications and motions to a Judge in Chambers, to be increased in the discretion of a Judge	$5 00	$3 00"

It is contended on the part of the sheriff that every motion or application which is not a "motion of course" is a special application or motion. I had occasion to deal with this question while exercising my duties at Moosomin as a Judge of the Supreme Court of the North-West Territories, and on the clerk applying to me I directed him to tax counsel fees under these respective items in his discretion: if he considered the matter of the application to be such as not to amount to a special one, to deal with it under item 76; if special, under item 77. I am of opinion that this direction was correct. I entirely agree with the judgment of my brother Lamont in this respect in Lambert v. Winchester (an unreported case), in which he lays down the following: "Allowance of $1 counsel fee on motion setting down was proper. Though a motion to set down is not a 'motion of course' it is a 'matter not special' in the large majority of cases, and it is only when it is shewn to the taxing officer that the motion is opposed on some substantial ground that the higher fee provided in item 77 should be allowed."

That is in accordance with my judgment upon the subject in Gibson v. Brennan, 1 W. L. R. 577, at p. 579. If the contention for the sheriff is correct that every motion or application that is not a "motion of course" is a special application, and so embraced by item 77, then the words "or in matters not special" in item 76 are unnecessary. I am of opinion not only that those words were put in that item for a purpose, but that they serve a very excellent purpose, if construed as I construe them. The taxing officer is to ascertain the character of the application and exercise his discretion, in each case as it arises, as to which of these items of the tariff is applicable. In the case of an interpleader the sheriff will be protected as a matter of course if his affidavit is correct, and the subject matter is one within the provisions of the Rules as to interpleader. A case may arise (I have

known it to occur) where the application on the part of the sheriff might assume the character of a special application. In such case the taxing officer will exercise his discretion. The taxation of the counsel fee will be reduced from $5 to $2.

SASKATCHEWAN.

WETMORE, C.J. DECEMBER 11TH, 1909.

CHAMBERS.

COCKSHUTT PLOW CO. v. GRAY.

Mortgage—Account—Reference—Scope of Inquiry—Moneys Received by Mortgagees or which ought to have been Received under Trust Agreement with Mortgagor.

Application by the plaintiffs to confirm a report of a local registrar in a mortgage action.

A. Ross, Regina, for plaintiffs.

L. B. Ring, Regina, for defendant Gray.

WETMORE, C.J.:—This action was brought under the ordinary practice by writ of summons, practically for foreclosure. The property alleged in the statement of claim to be mortgaged, or equivalent thereto, consisted of lots 22, 23, and 24 in block 166 in the town of Qu'Appelle. The mortgage is alleged in the statement of claim to have been made by the defendants in favour of the plaintiff company. The defendant Smith did not appear to the action, but the defendant Gray did, and filed a statement of defence, in which he alleged: (1) that he never executed the mortgage mentioned in the statement of claim, or any other mortgage to the plaintiffs; (2) that he never executed or delivered to the plaintiffs any assignment of his rights in lot 22; (3) that he did not deposit with the plaintiffs the certificate of title to that lot by way of equitable assignment; (4) in the alternative, that, if the defendants were at any time indebted to the plaintiffs, such indebtedness had been fully paid and satisfied.

An order was obtained from my brother Johnstone for delivery of particulars of the payments alleged in the last men-

tioned paragraph by a prescribed time, and that, in default of delivery within that time, such paragraph should be struck out. It was alleged by the plaintiffs' counsel at the hearing before me that, the particulars not having been delivered, this paragraph was struck out. This was practically conceded on behalf of Gray to be true.

The matter came before my brother Lamont on the hearing of an application on the part of the plaintiffs for an order that the plaintiffs should be at liberty to sign judgment in this action against the defendant Smith for default and against the defendant Gray upon admissions made by him on his examination for discovery, and an order was made by that learned Judge directing a reference to the local registrar to take an account as between the plaintiffs and the defendants and to ascertain the balance, if any, now due under and by virtue of the mortgage, and declaring that the plaintiffs were entitled to a charge upon lot 22 in block 166 under and by virtue of an equitable mortgage by way of assignment and deposit of documents of title in respect of the moneys due under and by virtue of the mortgage (which did not on its face embrace lot 22); and the order further directed the defendants, within three months from the date of the order, to pay into Court the amount found due by the local registrar, with interest at 8 per cent., and on default sale of the premises.

The local registrar held his inquiry under this order, and lodged his report, and application is now made on behalf of the plaintiffs to confirm that report. Counsel appeared on behalf of the defendant Gray on this application. He raised no objection to the finding of the local registrar as far as it went, but he contended that the matter should be sent back to the registrar to inquire as to the amount of moneys received, or which ought to have been received by the plaintiffs except for their default under a certain trust agreement. I am not called upon to go back of the order made by my brother Lamont. The mortgage and the trust agreement were produced before the local registrar at the inquiry. It appears that this mortgage was made, not in favour of the plaintiffs alone, but in favour of the plaintiffs and the Fairchild Company Limited, and it embraces other property than lots 23 and 24. The mortgage and the trust agreement are both dated the 24th March, 1904. The trust agreement was made between the defendants and both the mortgagees mentioned

in the mortgage. It provided that the Cockshutt Plow Company and the Fairchild Company (whom I hereafter call the mortgagees) jointly were to send to Qu'Appelle on the 1st May, 1904, or sooner if deemed advisable, a man as their joint representative, the salary and expenses of whom were to be paid by the defendants; that the defendants were to turn over to this man all stock on hand, open accounts, notes of hand, and all other assets of the firm (meaning the firm of Gray & Smith); that such representative was to proceed to convert the same into cash, notes, notes received from sale of stock, and securities, and remit the same semi-monthly to the Cockshutt Plow Company (the plaintiffs), who were to act as trustees and to distribute the same as collected pro rata among the following creditors:—

The Cockshutt Plow Company claim	$12,578 00
The Fairchild Company claim	7,700 20
Merrick & Anderson	1,720 00
Great West Saddlery Company	900 00
Mrs. Raymond	300 00

The division of cash receipts was to be made on the first day of each month between those five creditors, and it provided that, in consideration of the defendant Smith executing a mortgage to the mortgagees jointly on the east half of sections 18, 19, and 15, the mortgagees agreed to extend the time of payment of Gray and Smith's present indebtedness to the 1st January, 1905. These half sections are not mentioned in the mortgage on which this action was brought; that mortgage embraces only lots situated in the town of Qu'Appelle. The mortgage in question sets out the indebtedness to the mortgagees respectively as stated in the trust agreement, making the total amount of the mortgage $20,278.20. There can be no doubt that the money secured to the mortgagees by the mortgage in question was the indebtedness alleged to be due to them respectively by the trust agreement.

Gray's counsel insisted before the local registrar that he should take an account of the moneys received by the plaintiffs as trustees under the trust agreement. The local registrar refused to do so, holding that he was only at liberty under the order to take an account of the moneys received by the mortgagees under the mortgage. I am of opinion that the local registrar was not correct in this respect. So far as I can gather, nothing was ever heard of this trust agreement until

after the local registrar opened his inquiry. Although the defendant Gray appeared and pleaded, as I have stated, he never set up the trust agreement, or asserted that the plaintiffs were entitled to account under it; he never set up before Lamont, J., any such claim; and the matter of taking an account under the trust agreement was not specially referred to the local registrar. It was urged on behalf of the plaintiffs that, by reason of the facts just mentioned, the local registrar could not go into the matter of the receipts and accounts arising out of the trust agreement, and Sanguinetti v. Stuckey's Banking Co., [1896] 1 Ch. 502, was cited in support of that contention. The head-note of that case is as follows: "Any special circumstance or fact affecting the amount due from the mortgagor to the mortgagee in a foreclosure action—such as a valuation of the security in bankruptcy—should be pleaded, or brought to the attention of the Court, before the usual foreclosure judgment is made, in order that a direction may be given to the chief clerk to have regard, in taking the account, to such special circumstance or fact; if this is not done at the trial, no such question can be subsequently raised on taking the account." That case was decided by a single Judge, but a very able one. I am not by any means confident that the judgment bears out the head-note to the very general extent specified in such head-note, or that the judgment can be taken to support the plaintiffs' contention. If it can, I am unable to follow it. But I conceive that there is a distinction to be drawn between that case and this one. In the Sanguinetti case the special circumstance that arose was the question of the valuation of a security in bankruptcy. The special circumstance that arises in the case I am now considering is the amount that ought to have been paid or considered as paid on account of the mortgage. Suppose the defendant Gray had not appeared or pleaded at all, and application had been made for foreclosure and sale, what would have been liable to happen? The first step to be taken would have been to ascertain the amount due under the mortgage. That might have been done by the Judge himself, by computing it under the plaintiffs' affidavits; he might have referred it to the local registrar or officer to so compute; or he might have referred it to the officer to hold an inquiry, and that without any request from the defendant. I have frequently done so. In case a reference had been made, the defendant would have

had a right to appear before the officer and seek to establish that he was not credited according to the plaintiffs with what he should have been credited. When it was referred to an officer to take an account, as was done in this case, the very object of the reference is to ascertain what was due under the mortgage; that is, to ascertain how much was or ought to have been credited, and what balance is due after such crediting, and what the mortgagor has got to pay to redeem. I cannot see why, on equitable principles, the defendant should be placed in a worse position because he appeared and pleaded. The question is entirely one of finding the amount due on the mortgage. In this case the trust agreement was made for the purpose of affording a means of raising money to apply on account of the claims of the creditors mentioned therein, including the amounts secured by the mortgage to the mortgagees. Although the mortgage and the trust agreement were separate documents, they were, in my opinion, one and the same transaction. Surely then, when the local registrar came to hold his inquiry, the plaintiffs would be obliged to account for and be charged, on the mortgage, with any amount they received under that trust agreement and applied to such mortgage. I apprehend that the local registrar required that much when holding his inquiry. (As a matter of fact he informs me that the plaintiffs did credit the amounts they admitted so receiving and applying). Right on the threshold he had thrust upon him an inquiry as to what had been received under the trust agreement. Was it open then to the plaintiffs to say to the local registrar, "You can go into this matter just so far as we choose to allow you but no further?" Can the Cockshutt Plow Company, as the trustees, say to the Cockshutt Plow Company, the mortgagees, "We apply so much of the moneys received by us as trustees on the mortgage which we hold," and then prevent the mortgagees attempting to shew that they had received more money as trustees than they have so applied, and which ought to be applied to it? I must say that I cannot bring my mind to the conclusion that that would be equitable or a proper accounting. I am quite well aware that the going into the receipts under the trust agreement will involve a consideration of the expenses of executing the trust, and the pro rata amount after deducting such expenses as the plaintiffs would be liable to have charged against them on the mortgage. That cannot be helped. It is pos-

sibly the unfortunate position the plaintiffs have got themselves in by accepting a trust which was to be executed largely for their own benefit. If some indifferent trustee had been elected, probably this matter might not have got in the position it is in.

The matter must be referred back to the local registrar to take an account of the moneys received by the plaintiffs under the trust agreement, or which ought to have been so received except for the plaintiffs' default, and, if any moneys were so received other than what have been already charged against the plaintiffs on the mortgage, or any moneys which ought to have been received except for their default, to charge the same against the mortgage amount pro rata according to the terms of the trust agreement.

SASKATCHEWAN.

WETMORE, C.J. DECEMBER 11TH, 1909.

CHAMBERS.

CANADA PERMANENT MORTGAGE CORPORATION v. MARTIN.

(TWO ACTIONS.)

Vendor and Purchaser—Judicial Sale under Decree in Mortgage Action—Charge for Taxes—Purchaser Taking Subject to—Land Titles Act—Noxious Weeds Ordinance.

Application by the defendants the Canadian Port Huron Co. for payment to them, out of moneys in Court, of sufficient to satisfy their claim and costs.

T. S. McMorran, Regina, for the applicants and for the defendants Martin, Lindsay, and Somerville & Co.

E. B. Jonah, Regina, for the defendants the Weyburn Co., Pugh & Livingstone, and L. A. Freeland.

S. S. Sampson, Regina, for F. I. Wilson, the purchaser of the property in question in the actions.

WETMORE, C.J.:—Two actions were brought for foreclosure in respect of mortgages held by the plaintiffs, one

against the south-east quarter of section 32-9-14 west 2 meridian, and the other against the south-west quarter of the same section. The properties were sold under decrees of the Court, and the claim of the plaintiffs on their mortgage was satisfied, and a balance remained of $2,787.23, realised from the sale of both properties. The Canadian Port Huron Company had a second mortgage which covered both the quarter sections. The other defendants are execution creditors, whose executions were registered subsequent to the mortgage of the Canadian Port Huron Co. Wilson, who purchased both of the quarter sections, claims to be paid, out of the money in Court, $217.48 standing as a charge against both quarter sections under the Noxious Weeds Ordinance (ch. 24 of 1903). The orders for sale directed that, in default of payment of the amounts assessed as due under the mortgages, "the mortgaged property should be sold." An affidavit of Wilson's was read in which he stated that at the time of the sale nothing was said by the officer under whose directions the sale was made, or by the auctioneer, to shew that the sale was made subject to any charges whatever, and that he was not aware that any charge was against the land. Some Ontario cases were cited to me, and it was urged that they supported the proposition that the purchaser was entitled to get the property discharged from these taxes, and Turrill v. Turrill, 7 P. R. 142, was especially relied on. That case certainly appears to go the length. I am not prepared to say that the others do. I am of opinion, however, that these authorities are not applicable in this province, where the Land Titles Act (ch. 24 of 1906), is in force. It is stated sometimes that that Act deals entirely with matters of registration. I am of opinion that that is not correct. It undoubtedly was intended to and does deal largely with matters respecting the registration of land titles, but it also deals to some considerable extent with the question of title. For instance, the Act provides for the issuing of certificates of title to the owner, and that, if there are any registered mortgages or incumbrances, or notice authorised by the Act, or executions, they shall be noted on the certificate of ownership so issued, and that the owner takes his title subject only to the mortgages, etc., so noted on the certificate, except as stated in sec. 76 of the Act. That section provides as follows: "The land mentioned in any certificate of title granted under this Act shall, by implication and without any special

mention therein, unless the contrary is expressly declared therein, be subject to . . . (b) all unpaid taxes."

When a suit is brought to foreclose a mortgage given upon land which has been brought under the Land Titles Act (as the mortgages in this case were), a mortgagee from the owner takes his right subject to what appears upon the certificate of title, and of course subject to taxes and the other matters mentioned in sec. 76, if any. The Court in decreeing a sale can only take notice of what appears on the abstract of title received from the registrar of land titles. and any charge for unpaid taxes would not appear on that. If there is a prior incumbrance, mortgage, etc., the order of sale will direct that the sale shall be subject to such prior incumbrance, mortgage, etc. A purchaser under the order of sale will, however, acquire the titles and rights of the owner or mortgagor and of all parties whose rights or titles are duly registered, and in point of time subsequent to the mortgage proceeded upon, provided, of course, that all the subsequent parties have been brought before the Court, and it is the practice of the Judges to require an abstract of title for the purpose of ascertaining whether the proper parties who may be bound by the decree are brought before the Court. The Court, however, is not bound or called upon to insist upon information or proof respecting charges such as those mentioned in sec. 76, and which are not registered. Every intending purchaser is informed by the order for sale whether the land is to be sold subject to other registered mortgages, etc., or not, but he has no knowledge from the order whether it is subject to a charge for taxes or not. But every person is supposed to know the law, and an intending purchaser must take notice that the property may be charged at the time of sale with a charge for taxes. There is a place where it can be found out whether there are any such charges or not, and he must make inquiry there. If there are such charges, and whether he inquire or not, he is bound to take notice that such charges exist, and whatever he purchases, therefore, is subject to such charges. If it turns out that he has not made proper inquiries, and purchases without doing so, and that there are such charges, he has got to take the land subject thereto. That, in my opinion, is the intention and purview of the Act. It seems to me that it is not unreasonable. Take this very case for instance. The plaintiff had leave to bid. It was natural that other mort-

gagees would attend to protect their securities, and see if the land was worth it, and that they did not lose the benefit of such securities by its being knocked down below its value, and they have the right to bid. In this case the land realised more than the plaintiffs' claim. It is fair to assume that the Port Huron Company, the next registered mortgagee, would be present to see that the property was bid up to the amount of their mortgage at least and over, so as to make them secure, and, if the purchaser had not bid the price for which the property was knocked down to him, they might have done so and taken the property. Again, another bidder may be present at the sale who is aware of the incumbrance by virtue of the taxes, and prepared to go to the extent of his last bid, possibly a few dollars below that which the purchaser has bid, but the purchaser by going higher puts him out. If the purchaser had not bid over his last bid, he was prepared to take the land subject to the charge. Surely, in such circumstances, it does not lie in the purchaser's mouth to turn round and say, "I did not know there was an incumbrance upon this land; if I had known it, I would not have bid so much."

Of course counsel for Wilson urged that the taxes in question were a charge against the land. These taxes were $6.48 for the year 1908, and $211 for the year 1909. Section 13 of the Ordinance provides that any amount which has been expended for the purposes mentioned by the Ordinance in destroying or disposing of noxious weeds, "which has not been satisfied on or before the 1st day of January next following its expenditure, shall be added to and form part of the local improvement assessment of such lands in all respects as if it were an original tax, and it shall have the same effect on the land and may be recovered in any of the modes available for the recovery of such taxes." It was not questioned that the taxes for the year 1908 are a charge on the land. That was not disputed, but it was contended that the taxes for 1909 are not a charge and would not become so until the 1st January, 1910. I do not consider it necessary to decide that question. If they are a charge on the land, under my judgment Wilson has got to assume it; if they were not a charge on the land at the time of the sale, then it is clear from any standpoint that the amount should not be discharged out of the moneys paid into Court.

The order will be that out of the moneys paid into Court altogether in both suits the Canadian Port Huron Company be paid to the extent of their claim and costs of both suits and of this application; and that the balance, if any, be distributed pro rata among the execution creditors according to the amounts of their respective claims. But the paying out under this order will be stayed for 15 days from this date in order to allow Wilson an opportunity to appeal from this judgment if he desires to do so.

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SASKATCHEWAN.

MCLORG, DIST. CT.J. DECEMBER 12TH, 1909.

DISTRICT COURT OF SASKATOON.

VERNON FRUIT CO. v. CANADIAN PACIFIC R. W. CO.

Railway—Carriage of Goods—Negligence—Injury to Perishable Goods by Delay in Transportation and Want of Ventilation in Car—Absence of Evidence as to Condition when Shipped — Bill of Lading — Condition Limiting Liability—Form Approved by Board of Railway Commissioners—Dominion Railway Act, sec. 284—No Route being Designated, Carriers Choosing Longer Route—Shorter Route Used in Previous Shipments—"Delay"—Notice in Writing not Given in Time—Waiver—Authority of Station Agent—Estoppel — Pleading — Amendment.

Action for damages for negligence of the defendants as carriers of produce shipped by the plaintiffs.

F. F. McDermid, for the plaintiffs.

R. W. Shannon, for the defendants.

MCLORG, DIST. CT.J.:—The facts, as I find them in this case, are as follows. The plaintiffs are wholesale fruit and vegetable merchants, carrying on business at Vernon, B.C., and were in the habit of shipping cars of fruit and vegetables from Vernon to Saskatoon. Upwards of 20 cars had been so shipped by them during the year 1908, over the defendants' line, and all these came along the defendants' line to Regina, and thence by the Canadian Northern Railway to Saskatoon,

the time occupied in transit being 6 days to Regina and 1 from there to Saskatoon.

The statement of claim originally claimed damages for goods shipped in 2 cars, numbered respectively 181478 and 181344, but the claim of damages in connection with the former car was abandoned. I may say incidentally here that counsel for the defendants conceded the quantum of damage to be correct in the event that it should be found that the plaintiffs were entitled to damages at all.

Car 181344 was shipped under the ordinary shipping bill used by the defendants, containing certain provisions to which I will later refer, from Vernon, B.C., on the 12th November, 1908, and arrived at Saskatoon on the 21st of the same month.

No notice was sent or given the consignee of its arrival, but he saw it first on the 23rd November at noon; delay arose in having it placed on the Canadian Northern Railway tracks (which apparently was necessary, though why such should be the case was not explained), and he ultimately obtained delivery of it on the 24th November.

It was conceded that this car, in place of coming by Regina, as the previous cars had done, was shipped on the defendants' line to Kirkella, and thence by a branch of the defendants' line to Saskatoon, some 300 miles longer than the previous route. The car was loaded with apples, celery, and onions; the claim in question is confined to damage done to the celery and onions.

On opening the car on the 24th, the consignee, William Fee, a member of the plaintiff company, found the celery and onions damaged, and called in the witness Sproule, the head of the freight department at Saskatoon of the defendants, and they together inspected the condition of these damaged articles, and agreed that they had better be disposed of at once, and what was received from the sale placed to the credit of the "damage account," and that the plaintiffs would put in a claim for the balance when it was ascertained how much this would be. The plaintiffs, through the consignee, refused to accept this part of the shipment, except subject to a claim for damages, and, on the course above mentioned being determined on, he paid the freight charges and proceeded to sell such onions and celery as were still marketable, receiving therefor $12.05. There were 1,842 lbs. of celery at 9 cents per lb., $165.78, and $10 worth of dam-

aged onions, which, after dducting the $12.05, leaves a balance of $163.73, for which the plaintiffs now sue.

No direct evidence was given of the condition of the celery when shipped, but Fee testified—and I accept his testimony, especially in view of the fact that, were it incorrect, Mr. Sproule could have contradicted it—that it was well packed in cases in the usual way—from 42 to 47 lbs. in a case—and on arrival was found to be badly heated. Some few of the cases near the door were not so bad as the rest; in fact, the stalks in cases next to the door were in good condition, gradually becoming worse as they approached the inside of the car. The witness accounted for this change in condition by explaining that the ventilation or draught from the door would have the effect of retarding the heating process, which apparently was caused from want of proper ventilation. The damage to the onions was caused by wet from the celery. There is little, if any, dispute about these main facts.

The plaintiffs' claim summarised is for damages to these articles caused by forwarding them by the longer route above indicated, thereby causing the delay which it is contended brought about this damage.

There was a certain amount of contradiction regarding the length of time celery would keep under these conditions; the witness Waldron testifying that he brought in celery, both from Vernon and from California, and that celery from Vernon would be in good condition even for 2 weeks; he, however, always brought it in by express; the Californian celery would keep much longer than that from British Columbia.

Under all the evidence, I judge that with proper ventilation 10 days would be approximately as long as it could be safely trusted for shipment.

The defendants contend that the bill of lading, having been approved by the Board of Railway Commissioners, is binding on the plaintiffs; that it has not been shewn that the delay was the proximate cause of damage, because they contend that there is no evidence shewing the condition of the celery when shipped; that no route was designated by the shipping bill; and that, consequently, the defendants had the right to ship by whatever route they chose; that by clause 3 of the shipping bill the defendants are not liable for delay of perishable articles; that clause 15 is much to the same effect; and that no notice, as required by clause 12, has been given to the defendants.

It will be well, I think, in the first place, to examine the nature of the duties and liabilities of the defendants. This action is brought against them as common carriers, and in Walters v. Canadian Pacific R. W. Co., 1 Terr. L. R., the present learned Chief Justice thus defines their position: "The defendants' obligation or contract as common carriers, unless limited by some special agreement with the plaintiff, or by some notice, condition, or declaration which they might lawfully make or give, was to carry and safely deliver the goods at all risks, save only the act of God or the King's enemies. In that case they were insurers of the goods, and if they failed to deliver they would have committed a breach of their contract, and would be liable therefor, and that whether such failure was brought about by their own negligence or wrongful act in managing their railway, or by the negligence or wrongful act of another person, or by accident." And he goes on: "While the ordinary liability of a common carrier is as above stated, it is quite clear that such liability could, at common law, be limited by special contract; even as against the carrier's gross negligence or that of his servants."

That being so, the defendants have chosen to limit their liability—in so far as they can do so, which I will discuss later—by the provisions of the shipping bill referred to. A certified copy of this under sec. 340 of the Railway Act, approved by the Railway Commission, was put in on behalf of the defendants. This doubtless entitles the defendants to impose these conditions and make use of this form, but leaves the construction of these conditions and their applicability to the circumstances for the Court to determine: Booth v. Canadian Pacific R. W. Co., 5 Can. Ry. Cas. 389, at p. 394.

Now the duty of the defendants, so far as the case is concerned, is set forth in sec. 284 of the Railway Act: "The company shall according to its powers (c) without delay and with due care and diligence, receive, carry, and deliver all such traffic," i.e., traffic offered for carriage upon the railway. And under sub-sec. 7: "Every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section (284) shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from any negligence or omission of the company or its servants."

I will now deal with the second point raised by the defence. It is true that there was no direct testimony as to the condition of the articles when shipped, but, on the other hand, there is first of all the fact for what it is worth—I think it is a presumption in favour of the plaintiffs, though nothing more—that this was one of many shipments by the same people, and that no trouble had occurred before when the journey occupied the usual 7 days; there is the shipping bill, which acknowledges receipt of the goods in question at time of shipment, "in apparent good order;" and there is the testimony of Fee, a shipper of 18 years' experience, corroborated by the witness Grogan, establishing the fact, as I have stated, that where ventilation was available the celery was undamaged. Fee testified that, from the condition of the undamaged celery, it was in good condition when shipped. The process of heating as exemplified in a single case seems to me to point strongly to the conclusion that the damage herein was caused by the lack of ventilation, coupled with the delay, and that the celery was in good condition when shipped; and I so find.

I think it establishes a prima facia case for the plaintiffs.

In Moore v. Harris, 1 App. Cas. at p. 326, Sir Montague E. Smith lays down the law as follows: "They also think that the Judges gave undue weight to the consideration that the plaintiff offered no proof of the condition of the tea when it was shipped. There is not, and, in the nature of things, cannot be, any general rule of law or evidence on the subject. It must depend on the circumstances of each case, how far such proof is necessary, and the case is to be regarded as inconclusively proved without it. Where, for instance, a cargo of grain is found to be heated—a damage which may arise either from its bad condition when shipped, or from some cause existing in the ship—it may be essential to prove the state of the cargo before its shipment. But where, as in this case (supposing, of course, the evidence to be believed), noxious substances, calculated to produce the peculiar damage actually present, are found to have been used in close proximity to the tea, cause and effect are so nearly brought together that a conclusion can be reached without proof of its condition at the time of the shipment."

It will be noted that the very case of heated grain or produce is referred to, and it may be cited as an argument against my present finding, but it will be observed that the

language used in that case is, "it may be essential," indicating that, even in the case cited, it may not be absolutely necessary.

The only hypothesis on which the condition of the celery could be reconciled would be that the shipper packed nothing but produce in good condition near the door, and celery in bad condition in the rest of the car, which, seeing that it was the plaintiffs' own property, seems to me most improbable.

It is obvious, I think, that the length of transit, coupled with the lack of ventilation, caused the trouble; the one would be inoperative without the other; and I think, therefore, that it is not unduly straining language to say that the delay in delivery was the proximate cause of the damage.

Having found this fact, I will consider the question whether, no route being designated, the defendants were not at liberty to send it as they did, or whether not shipping it by the shortest route amounts to delay within the meaning of sec. 284. Now, I think the position of the parties must be looked at when they made that shipment. It must be remembered that upwards of 20 shipments had been made before, all by way of Regina; this being so, I think the plaintiffs, receiving no notification to any other effect, could reasonably assume that the same route would be pursued, and could reckon on receiving the shipment in the ordinary course of events within the usual time—the 7 days; as an illustration of how important they considered the length of transit, I will point out that Fee testified that no shipments were ever made so timed as to arrive on a Sunday.

These, to the knowledge of the defendants, were perishable articles, and it seems to me that it was either the duty of the defendants to send the goods by the shortest route, or to notify the plaintiffs that they proposed to use the longer way, and give them an opportunity of saying whether they would take the risk of shipping under those circumstances; it would be no use shipping if, by reason of the time taken in transit, the goods would, in all probability, spoil.

The section says "without delay." There may have been no undue delay in the train that brought it, but the words cannot have this restricted meaning, otherwise the defendants, to gain the benefit of shipping over their own route—which is the only reason put forward for shipping it via Kirkella in this case—might ship it for their convenience to Winnipeg and thence back, which is absurd.

There is no pretence that it could not have been sent via Regina, so that it comes, I think, within the term "according to their powers."

The law on the point, apart from the statutory provision to which I have referred, is laid down in Taylor v. Great Northern R. W. Co., L. R. 1 C. P. 385. That was an action for non-delivery of goods in time for a certain market, but the delay was caused by circumstances over which the defendants had no control. It was held there that, in the absence of a special agreement, the defendants were only bound to deliver within a reasonable time, looking at all the circumstances of the case. Erle, C.J., holds "a reasonable time" to mean "a time within which the carrier can deliver, using all reasonable exertions." Byles, J., says: "The delay in the case was an accident, so far as the defendants were concerned, entirely beyond their control, and therefore I think they are not liable." Montague Smith, J., says: "It is the duty of a common carrier to convey the goods without an unnecessary delay or deviation; but it may be necessary for the safe carriage of the goods that he should either delay or deviate in his course, and he is then justified in doing so."

Nothing of this nature occurred here; the goods were sent round by Kirkella for the convenience and profit of the defendants; that being so, and there being no necessity for the change in route, their action seems to me to amount to a deviation as above expressed, which would render them liable at common law, and which amounts to delay within the meaning of the statute: see also James v. Dominion Express Co., 6 Can. Ry. Cas. 309.

But it is contended that the terms of the shipping bill exonerate the defendants. So far as this branch is concerned, these conditions are as follows:—

"3 The company is not to be liable for damages occasioned by delay of perishable articles."

"15. The company shall not in any case, or under any circumstances, be liable for loss of market, or for claims arising from delay or detention of any train in the course of its journey," &c.

I will deal with the last section first, as I think it has no applicability here.

The damages are not claimed by reason of loss of market —I have not quoted the whole of the condition—but its entire construction shews that it is designed to cover cases in

which goods are shipped for a particular market—not the case here.

The damages here are claimed for the destruction or partial destruction of the articles themselves, and as such would be covered by condition 3.

Now, whether this forms a defence or not, depends upon whether the delay I have found amounts to negligence or omission on the part of the defendants, or their servants, under sec. 284, which I have referred to. It seems to me beyond doubt that it does so. To delay shipping perishable articles or delay them in transit must surely—without reasonable cause—mean and amount to negligence. To hold otherwise would seem to me to put an end to the shipping of perishable articles altogether: James v. Dominion Express Co., above cited.

In McMorrin v. Canadian Pacific R. W. Co., 1 O. L. R. 561, Meredith, J., says (p. 565): "There is nothing in the Act—the Railway Act—preventing companies making such conditions, but they cannot thereby relieve themselves from liability for damage arising from their negligence."

See also St. Mary's Creamery Co. v. Grand Trunk R. W. Co., 3 Can. Ry. Cas. 447, especially at p. 452, where the doctrine of Vogel v. Grand Trunk R. W. Co., 11 S. C. R. 612, is adopted, and this case still regarded as an authority, though certain doubts had been cast on it in the decision of the Supreme Court in The Queen v. Grenier, 30 S. C. R. 42, at p. 53. To the same effect is Booth v. Canadian Pacific R. W. Co., 5 Can. Ry. Cas. 389, decided 9th April, 1906. The history of this legislation to its present form is given in Mercer v. Canadian Pacific R. W. Co., 17 O. L. R. 585; and I am of opinion, therefore, under the authority of these cases, that this clause under the circumstances forms no defence to the action.

I come now to clause 12, which provides: "There shall be no claim for damage for loss of or detention of or injury or damage to any goods for which the company is accountable, unless and until notice in writing, and the particulars of the claim of said loss, damage, or detention, are given to the station freight agent at or nearest to the place of delivery, within 36 hours after the goods in respect of which said claim is made, or such portions of them as are not lost, are delivered."

I have nothing to do with the question whether such a clause is reasonable or no; it is a matter of contract between the parties; I can quite understand that, in a case such as this, it might be practically impossible to comply with it—because the damage suffered would not be fully ascertained until the sale of the articles in question had been completed—and therefore the particulars of the claim would not be available. In Northern Pacific Express Co. v. Martin, 26 S. C. R. 135, a term such as this was held to be a condition precedent to recovery; see also Mason v. Grand Trunk R. W. Co., 37 U. C. R. 163.

It is pleaded, however, that the defendants waived this; and, on the other hand, it is contended that the station agent had no power or right to waive it. A written claim with particulars, to the sufficiency of which no objection was raised, was put in—but it was not put in within the time specified; the evidence is not very clear just when this occurred, but about a week or 10 days after the arrival of the car.

Now, I think there is no doubt that, as between private individuals, the defendants here would be considered to have waived the strict compliance with this condition.

What are the facts? When these goods arrived, their condition was pointed out to the very man to whom the written notice is prescribed to be given—and he assents to their being sold, and, when the actual damage is ascertained, the plaintiff is to present his claim. This evidence of the witness Fee is uncontradicted; in fact, Mr. Sproule confirms it, and Mr. Sproule himself swore it was the best arrangement that could be made in the interests of the defendants. That being so, the plaintiffs proceed to carry out this agreement, and, having ascertained the exact damage, they present their claim.

Now, as I say, between private individuals would not this amount to a waiver of the condition so far as time is concerned, or, to put it in another way, would not the defendants be estopped by their conduct from setting up such a plea?

Why, then, should the defendants, because they happen to be a corporation, stand on any different basis? Sproule swears he has no right to vary a contract or waive a condition, but he admits he is the proper person—as indeed the condition specifies—to whom this matter should be reported,

and to deal with it, and that he has no written code of instructions, but, in the absence of special instructions, acts according to the best of his judgment on behalf of the company. Why, then, should he not have power to waive this condition? Corporations must act by their agents, and he is the agent appointed by the company to deal with matters of this nature. If it could be waived at all, it could be waived by this very man; he was, so far as I can see, acting within the scope of his duty in dealing with it.

It is true that estoppel has not been specially pleaded, which plea of course is always necessary when relied on; but, in view of the fact that all the evidence on both sides was put in covering this point, and that such a plea, under these circumstances, would not, in my judgment, in any way put the defendants to an unfair disadvantage, I have no hesitation in allowing it to be raised even now.

In doing this I have not overlooked the remarks of Beck, J., in Cels v. Railway Passenger Assurance Co., 11 W. L. R. at p. 711, where the propriety of allowing amendments at their stage is discussed, but the facts in this case are entirely different; there the proposed amendment might have worked a hardship, whereas here, as I say, the evidence was thoroughly gone into, and it is merely a matter of properly pleading the law, on the facts that were given in evidence at the trial.

I think it would be little short of a miscarriage of justice if the plaintiffs' claim were defeated on such a narrow ground.

There will, therefore, be judgment for the plaintiffs for $163.73 and costs.

In the event of this case going to appeal, it will be proper to point out that an amendment allowing the defendants to plead condition No. 3 was allowed at the trial, which may, under certain circumstances, affect the matter of costs.

YUKON TERRITORY.

CRAIG, J. NOVEMBER 22ND, 1909.

TRIAL.

OLSEN v. DESJARLAIS.

Mines and Minerals—Trespass to Placer Mining Claim—Justification—Entry as of Right—Grouping of Mining Claims—Partnership for Specific Purposes of Doing Representation Work—Yukon Placer Mining Act, sec. 37—Evasion of Statutory Duty—Payment of Debt or Expenses—Damages—Value of Ore Mined—Costs of Severance—Evidence.

Action for the recovery of damages for trespass on a placer mining claim owned by the plaintiff. The plaintiff and the defendant owned adjoining claims, the plaintiff being the owner of 37 and the defendant the owner of 38 above discovery on Sulphur creek.

C. W. C. Tabor and J. L. Bell, for the plaintiff.

R. L. Ashbaugh and G. A. McPeake, for the defendants.

CRAIG, J.:—On the 11th July, 1906, the plaintiff and defendant grouped their mining claims for the purpose of representation under a grouping certificate of the 2nd July of that year, in which they made application to work the claims in common for the purpose of representation. Under that grouping allowance the plaintiff, on the 30th July, 1906, made his affidavit of representation, swearing in the work done as being done on claim 38, the property of the defendant, and referring to the grouping certificate above mentioned. After that, some transaction regarding wood took place, and an allowance of $25 was made on the wood deal to the defendant, as compensation for the representation, although it was clearly shewn that the defendant was not representing his claim, but working it in the ordinary manner to win the gold from it. On the 27th April, 1907, the plaintiff and defendant and one Elliott, who owned No. 39 adjoining, signed a partnership agreement agreeing to become partners for the purpose of doing the necessary representation

work on the three claims named, the recital of the agreement being that the partnership was intended to "create a joint liability between the owners of the said claims for the joint working thereof, pursuant to section 37 of the Yukon Placer Mining Act, and no one of the parties thereto shall be able to bind the other beyond the representation work necessary to represent and renew the claims." This document was filed and the certificate based upon it under sec. 37 of the Act of 1906, now sec. 51 of ch. 64 of the Revised Statutes. The section provides that "upon application being made to the mining recorder by any number of persons, or any person or persons not exceeding ten in number, owning adjoining claims, the mining recorder may grant permission, for a term not exceeding ten years, to any such person or persons to perform on any one or more of such claims all the work required to entitle him or them to a renewal grant for each claim so held by him or them, provided that where the application is made by more than one person the applicants shall file with the mining recorder a deed of partnership creating a joint liability between the owners of the claims for the joint working thereof." The evident intent and spirit of this provision is to enable miners who own a block of claims or a body of miners who own adjoining claims to do effective prospecting work to ascertain the value of the claims for the future operation of the same and the winning of gold. It must be clear that it is not the intention of the Act or of the framers of it that men may evade their duty to work their claims or may group their claims and evade the representation work or use actual mining operations for swearing in their own representation, which they neglect or postpone. That obviously could not be the intention and obviously is opposed to the entire spirit of the Placer Mining Act. The evidence shews that at the time these grouping certificates were obtained both these claims were nearly worked out, at least 38 was practically worked out a year after, and 37 pretty well worked out, although it was known, as appears afterwards, that some pillars of value remained in the ground.

Now, the clear intention of these parties, as I conclude from the evidence, was to make the agreement an accommodation for themselves, by which, if they did not care to work their claims in any one year, they could use the work of their neighbour who was carrying on mining operations,

and thus evade their statutory duty. They never intended to jointly prospect and work in partnership in a prospecting venture to prove up their claims; that was not their intention. The intention was to evade their duty. This is proven by their conduct. In the first year Desjarlais gets $25, when he really did not ask for anything and did not desire anything. The next year he asked for nothing, although the representation work is proven up in the same way by work done upon his claim; he gets some accommodation from Olsen in the use of certain sluice boxes, and that is supposed to be quite the equivalent of any work which he did; in fact he did no labour. There was no partnership in the operations at all. There was only a partnership in so far as the one used the work of the other to prove up his work as required by the Act. The partnership agreement in this case limits the partnership to the bare representation, which is $200 in any one year, and it is not such an agreement or partnership as the Act requires.

In the year 1908, and after the grouping of the three parties, Olsen left the country, relying upon the work to be done by Elliott, the owner of 39, to prove up his claim for the year. Elliott did not do that work, and the claim of Olsen was jumped by another party. Desjarlais, hearing of this, came into the Commissioner's office and proved up the work by virtue of operations which he carried on on his own claim and obtained the renewal grant for Olsen's benefit. In this year Desjarlais swears that he was not doing actual mining work, but, as he calls it, punching holes, and the punching of these holes proved that his own claim was useless and worked out. The following year, he being of the opinion, as I think is clearly shewn from the whole of the evidence, that one Frilen was the owner, and Frilen having left the country and his whereabouts being unknown, and Olsen also being out of the country, went on to claim 37 and carried on somewhat extensive mining operations. It is important to find out, if possible, the attitude of Desjarlais's mind at this time so as to properly assess the damages against him. One Knorr, who was the attorney for Olsen, although not being aware that 37 was a claim which Olsen owned, owing to Olsen's omission to include it in a list of properties which he handed to Knorr before leaving, was seen by Desjarlais, and Desjarlais asked about Olsen's address, but did not reveal to Knorr anything of what he was doing. Knorr gave him the ad-

dress. Desjarlais says he asked Knorr who was acting as Olsen's attorney. Knorr denies this. Desjarlais further says that when he asked Knorr he did not tell him that he was the attorney. This is a story which I cannot believe. Why should Knorr deny his powers? There was no reason for it. Knorr discovered afterwards that this property was the property of his principal, visited the claim in company with one Michie, and saw the defendant Desjarlais, who admitted the trespass, and then set up as a ground of justification that Olsen was indebted to him for 3 years' representation work. He asserted no other right or title to enter upon the ground. Afterwards by his pleadings and in his defence he asserted the right to enter by virtue of the grouping certificate.

There are the 3 main points for me to consider: What was the attitude of Desjarlais's mind when he entered upon the ground? Under what right did he enter, and whether by virtue of the right to collect his debt or by virtue of the right to go on under a grouping certificate and do representation work?

First, as to the debt. There was no debt whatever. Their partnership was a partnership to share in a joint liability for representation work done as such. It would have to be shewn that any one of these three parties joining in this grouping had performed the work as representation work and with the intent and object of representing, and nothing else. If the defendant had been carrying on operations to extract gold in the usual way, that would not be a performance of work under a partnership agreement for representation. As to the first of the two years, I hold from the evidence that that was paid for, if any debt was incurred at all, by the $25, and that on the signing of the new grouping certificate Desjarlais made no further claim; that in the second year, if a debt was contracted, Desjarlais released it. But I hold there was no debt, and Desjarlais assented to that—that there was no debt. As to the third year, in which Desjarlais intervened and proved the representation work on the claim after the jumping, that was the year in which Desjarlais says he punched holes in his claim for the purpose of testing it. Now, there is no evidence that he did that work as representation work for the 3 properties or any of them. He did it for the purpose of ascertaining if he could find any new pay-streak. There may be some doubt as to this year, and as to this

Olsen is quite willing that Desjarlais should be paid; although not legally admitting the debt, he still thinks that in fairness Desjarlais should be paid the $200 and the expenses which he incurred. This I fix at $260. Having incured this debt, if there was a debt, what right had Desjarlais to go on to Olsen's claim and collect that debt by his own means? None whatever. It would be introducing an entirely new principle of collecting debts if one were to say that a debt incurred by the representation of a placer mine, could be collected in any future year by the creditor trespassing on an adjoining claim and taking out what he thought sufficient gold to pay his debt. I do not think Desjarlais went on with any such intention. He found that his own claim was valueless. He knew that Frilen, the probable owner, was in Sweden, not likely to return. He knew that Olsen was out of the country, and he also knew by rumour that a pillar of pay dirt remained in a certain locality on Olsen's claim, and he went after that pillar. That he knew pretty well where the pillar was appears from his own evidence and from the chart which he drew of his operations. He sank a shaft and ran in a certain direction, hoping to strike the pillar, as he says. Later he struck the pillar by another tunnel, and took out the entire pillar. I am satisfied that he hoped to win this gold and have no questions asked him. There was no mistake of title at all. He knew he was on ground not his own. He could easily have ascertained who the owner was; if he was in doubt, he had only to look at the records, where he would have found not only the ownership but that Knorr was the attorney. He kept no account of the cost of his workings and the product of the gold; he mixed up the gold with his own, used it as his own to pay his debts, and in every way confused the working. He says he put down the three clean-ups, and told Knorr when he went there that evidence would be produced as to the amount of those clean-ups. He permitted one Martenson to go upon the claim and occupy a cabin on it, telling Martenson that he was the owner of the claim. He told Martenson that he had, with some gold dust which he shewed him in the pan, already cleaned up $3,000, and would yet from the dump clean up about $2,000 more. At the trial the only evidence given as to what clean-ups were made prior to the receiver taking possession was Desjarlais's own evidence; not another witness was examined on this matter. He had two of his

workmen give evidence, but neither of them was asked this question. Why not is a mere matter of conjecture, but I think it is reasonable to conclude that they would have been adverse or he would have examined them. These men were entirely favourable to him. They dispute Knorr's and Michie's testimony that two-thirds of the dump was cleaned up before they got there. They and Desjarlais agree that only one-third was cleaned up, a very wide disparity in evidence, one of them going so far as to say that only one-quarter was cleaned up. They further say that they had no conversation with Desjarlais as to the nature of their evidence, and right after it appears clearly from their evidence and from Desjarlais's evidence that there was a conspiracy, if one may call it such, between them and Desjarlais, by which they filed liens on this claim 37 to obtain their pay against Olsen—an afterthought entirely, and, it appears by the evidence, suggested by Desjarlais's solicitor, with whom they made and concocted the whole scheme; the idea evidently being that, if Desjarlais could not succed in recovering and holding the gold which he had obtained by trespass, these workmen could recover and hold it by virtue of the Lien Act for work done on the property. I, therefore, do not believe that they had no consultation with Desjarlais about their evidence, and I am of the opinion that Desjarlais went on to the ground with the object of obtaining an unfair advantage, with full knowledge that he was a trespasser, and with intent to appropriate, without any accounting, the gold that he might win from the ground. It was urged that because Olsen was willing to sell this ground for $400 at a certain time, therefore that should be the measure of the damages. I do not think that could be seriously maintained.

It was also argued that the cost of severance should be allowed. I am also against the defendant in that contention. I have always expressed very strong views against trespassers on placer mining ground who enter wilfully. My views are set out in the cases of Raymond v. Faulkner and Kincaid v. Lamb, 4 W. L. R. 167; and in this latter case, which afterwards went to the Supreme Court of Canada (see Lamb v. Kincaid, 38 S. C. R. 516), that Court, particularly Duff, J., considered most of the authorities, and confirmed the views which I have so frequently expressed in these matters. He applies the test which Baron Parke applied to the case of Wood v. Morewood, 3 Q. B. 440, as to the defendant's act—

"Did he act fairly and honestly (not honestly only) in the bona fide belief that he had a right to do what he did?" I have already said that I do not think that Desjarlais did this. I believe that he was deliberately taking what he knew was not his own with the intent to deprive the owner of it permanently and to render no account. Therefore, he should not be entitled to any allowance for the cost of severance.

As to the quantity of gold which came out, I believe the evidence of Martenson when he says that Desjarlais told him that he had taken out $3,000. Desjarlais admits that he may have said this. When asked for an explanation, he says, "I was booming the property." When asked to explain what he meant by booming the property, he cannot tell except by giving a most confused and irrational statement. This evidence conforms entirely to the other evidence. The dump was placed on a side hill leading upwards from the shaft. Therefore, the greater part of the dirt would lie on the lower side of the dump next to the creek. This was the side which was cleaned up when Knorr and Michie got there. Both Knorr and Michie say that two-thirds of the dump was cleaned up, and I believe them. Knorr is practically an independent witness, and Michie is entirely so, and both are most intelligent, clear-headed men. The only other evidence against this is Desjarlais's own evidence, and that of the two workmen. Desjarlais's evidence was not at all satisfactory, either in its general result or in his mode of giving it, and the evidence of the two workmen was most unsatisfactory. I, therefore, believe Michie and Knorr, and that two-thirds of the dump had been cleaned up when they got there. It is also in evidence that the dirt last put on the dump would be the more valuable. This was the dirt first cleaned up. The evidence is that Desjarlais worked through some old workings, getting some little pay on the way, until he struck the pillar which was fairly rich. He says it panned from half a cent to a dollar. What the average panning was he could not tell beyond that, and he kept no track of this particular pillar. Knorr, in the presence of Michie and Desjarlais, panned 4 pans generally from the dump the day he went there, and that went 9¾ cents to the pan. Basing my calculation upon that and upon the evidence put in as to the measurement of the pillar and the entire evidence in the case, I think the estimate of $4,000 is a fair estimate of the value of the dirt

removed, and for this amount Desjarlais will be liable without any deduction except the sum of $260, which I allow him more because Olsen says it should be allowed in equity than for any other reason, and the sum of $285, being the costs of the receiver. There will, therefore, be judgment for $3,455, with costs. The money in Court will be paid over to the plaintiff as part of the sum recovered.

My conclusions as to the law, therefore, are as follows: that, under such a grouping arrangement of partnership as we have in this case, none of the parties to the agreement has any right to enter upon the land of the other without his consent by virtue of the grouping agreement; that a bare grouping for the purpose of representation creates a joint liability against the parties to it for civil remedy for any person affected by such a partnership and working in view of it, and does not create any partnership in the land, but simply a liability for the working of it. How far that liability would extend depends entirely upon the nature of the operations carried on by the parties under a grouping agreement, each case depending on its own circumstances; and in a case where, as in this case, the grouping was only done to evade the Act and to enable one party to use the bona fide mining operations of the other, no right arises by which one man can assert any claim of ownership or right of entry upon the property of another.

YUKON TERRITORY.

CRAIG, J. NOVEMBER 22ND, 1909.

TRIAL.

LAREAU v. OLSEN.

Mines and Minerals—Miners' Liens — Contract — Trespass.

A joint action under the Miners' Lien Ordinance to establish a lien upon a mining claim for work done by the plaintiffs, Noel Lareau, Oscar Levesque, and Edrasse Dion. All the facts appear in the judgment of Olsen v. Desjarlais, ante, and it was agreed that the evidence taken in that case should be used in this action.

R. L. Ashbaugh, for plaintiffs.

C. W. C. Tabor and J. L. Bell, for defendant.

Desjarlais appeared in person.

CRAIG, J.:—The judgment in Olsen v. Desjarlais will require to be read in conjunction with this. Having held that Desjarlais was a trespasser and had no right to enter upon the claim in question at all, I therefore hold that no lien can attach. No lien can be created upon the property of another unless by virtue of some contract by which he engages some one to perform work, or the work is done with his acquiescence. Certainly a lien cannot arise by virtue of a trespass, and therefore I dismiss the claims of these lienholders, with costs.

YUKON TERRITORY.

MACAULAY, J. NOVEMBER 23RD, 1909,

TRIAL.

BAXTER v. SENKLER.

Mines and Minerals — Miner's Lien for Wages — Lien not Filed in Time — Preservation of Lien — Occasional Services.

Proceedings commenced by originating summons, under the provisions of the Miners' Lien Ordinance of the Yukon Territory, to enforce a lien for wages against the "Copper King" mineral claim, grant No. 348, and the "Copper Queen" mineral claim, grant No. 3,406, situate in the White Horse mining district, Yukon Territory.

F. T. Congdon, K.C., for the plaintiff.

George Black, for the defendants Whitney and Pedlar.

E. C. Senkler, defendant, as administrator of the estates of M. P. Grainger and J. McIntyre, deceased, appeared in person.

MACAULAY, J.:—The plaintiff was the general manager for the defendant W. S. Thomas (who was operating the claims under an agreement with his co-defendants dated the

18th April, 1908, whereby the said Thomas had undertaken to work and develope the said claims with the right to purchase the same upon the fulfilment of the conditions contained in the said agreement), having entered into the service of the defendant Thomas on or about the 11th April, 1907, first in the capacity of accountant, and from the 1st May, 1908, as general manager of the operations of the defendant Thomas in the Yukon Territory, and so continued in such capacity until the 15th July, 1909. The amount due to the plaintiff for salary on the said last mentioned date, as appears by the evidence submitted, was $3,988.76.

According to the evidence of the plaintiff himself, he received a telegram from the defendant Thomas on 3rd March, 1909, instructing him to close down all operations on the "Copper King" mine, the operations of the defendant Thomas having been confined to the "Copper King" mine, and accordingly on the 4th March, 1909, all work was closed down at the mines, except for the fact that the foreman, Thomas Kerruish, remained at the mine during the month of March, being engaged in protecting and housing the tools and machinery upon the mining premises, and afterwards in the capacity of caretaker or watchman until the 15th July, 1909.

After the mine closed down on the 4th March, 1909, no further operations were ever continued by the defendant Thomas, and, on the 15th July, 1909, he allowed his option with his co-defendants to lapse, when, under the terms thereof, the property reverted to the original owners.

Whatever question there might have been as to Baxter's right to a lien for wages, had he filed a lien under the provisions of the Miners' Lien Ordinance within 30 days after the 30th April, 1909, it is quite clear to me that his occasional visits to the mine between the 4th March and the 15th July, and any service thereby rendered by him, was not of such a nature as to entitle him to a lien under the provisions of sec. 3 of the Miners' Lien Ordinance. It would be entirely against the spirit of the Act, in my opinion, to allow such a claim to be enforced, and consequently the plaintiff's claim must fail.

Many questions arose in this case which are not necessary for me to consider, owing to the view I have taken upon the merits. The action or proceeding will, accordingly, be dismissed with costs.

YUKON TERRITORY.

CRAIG, J. DECEMBER 4TH, 1909.

CHAMBERS.

LAREAU v. OLSEN.

Costs—Scale of—Miners' Lien Ordinance—Provisions as to Costs—Practice—Discretion—Several Lien-holders Joining in one Proceeding.

Application by the plaintiffs for a direction as to the taxation of the costs of the defendant.

R. L. Ashbaugh and G. A. McPeake, for the plaintiffs.

C. W. C. Tabor and J. L. Bell, for the defendant.

CRAIG, J.:—On the taxation of the costs in this action a question arose as to the scale of costs to be applied on the taxation. The Rules of Court in this Territory, established by the Judges under their powers in that behalf, have fixed three different scales of costs affecting actions in the Territorial Court, and these scales are based mainly on the amount involved in the action. There are Rules affecting particular classes of actions in regard to real estate, replevin, and so on, but, generally speaking, the scale of costs is fixed by the amount.

Lien actions are instituted under a lien order in council which incorporates the procedure of the Territorial Court in actions for recovery of liens under that order in council, and all such actions are started by orginating summons. The claim of lien may include the claims of any number of claimants who may choose to unite, and, under sec. 15, "any number of lien-holders may join in one summons, and any action brought by a lien-holder shall be taken to be brought on behalf of all the lien-holders who have registered their claims within 30 days before or within 30 days after the commencement of the action." No provision in regard to costs is made other than this: "When judgment is given in favour of a lien-holder, the Court or Judge may add to the judgment the costs of and incidental to registering the lien, as well as the costs of the action;" and sub-sec. 8 of sec. 15 provides that

"in any case the Court or Judge may proceed to hear and determine the matter of the lien and make such order as is just, and in case the person claiming the lien has wrongfully refused to give a discharge thereof, or has no just case for his claim, or claims a larger sum than is found by the Court or Judge to be due, the Court or Judge may order and adjudge him to pay the costs of the other party." As to apportioning the costs, the order in council is silent. Under the Lien Act of Ontario elaborate Rules are made regarding costs, and the Master and Official Referees and Judges have power to completely dispose of all questions arising, including the giving or refusing costs, and the rate of costs is fixed by the Ontario Act and the other Acts, and provision is made for the apportionment of the money to different lien-holders claiming: and in Holmested's note to that section regarding the apportionment he says: "Such costs would probably be ordered to be borne by the plaintiff or others according to the amount of their respective claims." We have no such provision here. We have the fixed Rule that the amount involved in the action shall determine the scale to be applied on the taxation. It is argued that each individual claim in this case is for an amount which would be taxed under the lowest scale. I cannot see that that affects the matter, if the whole amount involved in the action brings it within the higher scale. Speaking generally, there is no reason why in an action brought for $900 the costs should be taxed on a higher scale than in one brought for $800. They might both involve exactly the same amount of work. But our arbitrary Rule says that they shall be taxed on different scales. There is always, of course, the discretion of the Judge which he is allowed regarding costs, but that discretion should be used on sufficient grounds. What I am asked to do now is arbitrarily to say that when a certain number of lien-holders enter an action to recover, and all of their claims are under the amount fixed for the lower scale of taxation, then the costs of that action and of every such action shall be taxed on the lower scale. I do not think I can make any such order. I think I should be amending the Rules, which I have no power to do, if I did. It does not matter if there is one person or a dozen involved in the action—in this case three join in one action—so long as the amount involved which they seek to recover is an amount within the scale sought to be applied to it. I must either apply the Rule as it

stands or arbitrarily say that all lien actions shall be taxed on the lower scale, if the claim of one of the parties to the action is in a lower scale. It is true that these parties might have brought their separate actions, and the costs might or might not have been as much as now taxed in the joint action, or they might all have allowed one person to bring the action, and have come in, and then the costs would simply have been the amount of the one action and the costs of proving the claims of the other lien-holders. They did not see fit to do this, and I must just apply the Rule as it stands. I think the Rule perhaps works a hardship in many cases, and might be amended as regards lien actions, and a broader liberty allowed to the Judge under the Rules to apportion and fix costs in such actions. In the present case, where the lien-holders fail to establish a lien, the defendant is entitled to recover the costs of one action on the scale of the amount involved in the united action.

YUKON TERRITORY.

CRAIG, J. DECEMBER 8TH, 1909.

CHAMBERS.

OLSEN v. DESJARLAIS.

Appeal to Yukon Territorial Court en Banc—Stay of Execution pending Appeal—Terms—Special Circumstances — Return of Moneys Paid out of Court pursuant to Judgment—Practice.

Motion by the defendant, pending his appeal from the judgment of CRAIG, J., ante 455, for a stay of execution and a return of the moneys paid out to the plaintiff's solicitor, in the circumstances mentioned below.

R. L. Ashbaugh and G. A. McPeake, for the defendant.

C. W. C. Tabor and J. L. Bell, for the plaintiff.

CRAIG, J.:—Judgment was delivered on the 22nd November for the plaintiff for the sum of $3,455, and an order

was made that certain gold dust paid into Court by the receiver should be paid out, pro tanto, on that judgment. Upon this order judgment was signed, and the plaintiff's solicitor drew out of Court the gold dust there deposited, upon the order of the plaintiff, which he swears he has distributed and paid over to the plaintiff. The defendant now seeks a stay of execution, besides an order for the repayment of the money taken out of Court. When the money was drawn out by the solicitor acting for the plaintiff, and on his order, no notice of appeal had been given, and the plaintiff was not aware that any appeal was intended. This motion was not made until the 3rd December.

As to the return of the money, no undertaking having been given to repay it, even if it had been paid to the solicitor for costs, I cannot make any order that it be restored to the Court. It was really made as if made by execution. It was money derived from the operation of the claim by a receiver appointed by the Court and paid in by the receiver. Upon this point see the cases of Hood-Barrs v. Crossman, [1897] A. C. 172, and Hood-Barrs v. Heriot, [1896] 1 Q. B. 610.

As to the general stay of execution, our Rule provides that "an appeal shall not operate as a stay of execution or proceedings, except in so far as the Court or Judge may order." Under this Rule, which is similar to the English Order XVI., Rule 58, it has been held that special circumstances must be shewn to entitle a party appellant to a stay. What these special circumstances are must depend upon the facts of each case. Upon this point see Monk v. Bartram, [1891] 1 Q. B. 346, where it was held that on such a motion a party must come prepared with evidence of special circumstances; also the case of Barker v. Lavery, 14 Q. B. D. 769, where it was held that an execution for costs pending an appeal from the Court of Appeal to the House of Lords will not be stayed unless evidence be adduced to shew that the respondent to the appeal will be unable to repay the amount levied by execution. Earl Selborne, L.C., says: "The defendant is not entitled to have the application granted as a matter of course. Evidence ought to have been adduced to shew that the plaintiff would be unable to repay the costs if he should be unsuccessful before the House of Lords." This seems to be the settled law upon a motion of this nature under our Rule. The special circumstance urged in the case

is that the plaintiff resides out of the jurisdiction, in the United States, being represented by attorney, and that the only property which he has is the claim which was the subject of the litigation, and that that claim, as appeared by the evidence given at the trial, is worked out. These certainly are special circumstances, and, while not sufficient to enable me to order a return of the money paid out, still would justify me in staying execution upon terms. It appears, on the other hand, that the defendant is worthless. I am referred to the evidence given by him on the trial of this action, where, under cross-examination, he swore that he had no means, either here or elsewhere; that the claim which he had and which adjoined the one in litigation and was involved to some extent in the litigation, was also worked out. Therefore he might dispose of whatever machinery or property he has and defeat the execution now in the sheriff's hands.

Under these circumstances, the order will be that execution will be stayed, but that the executions will not be released, but will still attach and hold the ground and the property. A difficulty arises regarding the machinery and the sheriff remaining in possession (which will add greatly to the costs of the execution) during the long period which must elapse between this motion and the hearing of the appeal next spring. In that case arrangements may be made to store the machinery, or the machinery may be valued, under the direction of the sheriff, by two independent valuers, and the amount of the value of the machinery paid into Court as security pending the result of the appeal; otherwise this machinery will be sold and the proceeds paid into Court, to be held pending the result of the appeal. The plaintiff is at liberty to take any proceedings in the meantime to secure other property and seize but not to sell other interests of the defendant. He may also, if he sees fit, examine in aid of execution.

The costs of these matters will be held in reserve pending the disposition of the appeal by the Court en banc.

The costs of this motion will be paid by the defendant.

MANITOBA.

MATHERS, J. NOVEMBER 24TH, 1909.

SINGLE COURT.

JOHN ABELL ENGINE AND MACHINE WORKS CO. v. PORTER.

Mortgage—Assignment—Foreclosure — Subsequent Sale — Extinction of Prior Charge in Favour of Assignee — Retention of Lien on Part Unsold—Statute of Limitations—Partnership—Oral Agreement—Registry Laws.

Stated case in an action in which the company were plaintiffs, and James K. B. Porter (by revivor), as administrator ad litem of the estate of William Porter, deceased, and personally, was defendant.

The stated case was as follows:—

1. About the year 1892 William Porter was the owner of the south-west quarter of section 18, township 13, and range 17 west, in Manitoba, and entered into a partnership with James K. B. Porter under a verbal agreement to farm together the said land, and the land of the said James K. B. Porter. The plaintiffs, however, had no knowledge of these facts, except as appears by the registration.

2. About the year 1896, and while the said partnership still continued, the said partners purchased from the Canada North-west Land Company the south-east quarter of section 13, township 13, range 18 west. The purchase moneys were paid by the said James K. B. Porter. The plaintiffs, however, had no knowledge of these facts.

3. In the year following the said purchase, the said partners verbally dissolved partnership, and in the settlement which was then verbally made James K. B. Porter took over the said south-east quarter of section 13. The plaintiffs, however, had no knowledge of these facts.

4. Since the said dissolution the said James K. B. Porter has completed all payments of purchase money on the said lands; has paid all taxes and received all profits, and the said William Porter has not since said dissolution been in

possession of the same or any part thereof. The plaintiffs, however, had no knowledge, nor have they received any notice, of these facts.

5. On the 12th February, 1902, the said William Porter created a lien or charge on the south-east quarter of section 13 and the south-west quarter of section 18 in favour of the plaintiffs for the sum of $2,647.62, with interest thereon at 8 per cent., the amount of the purchase price of machinery under a written agreement, and on the 17th February, 1902, the plaintiffs registered the said lien in the Neepawa land titles office, the same being the registration office for the district in which the said land was situate. The plaintiffs have never released the said land or caused the said lien to be removed from the registered title of the said land or any part thereof. Agreement and lien produced.

6. Subsequently, namely, on the 3rd May, 1902, James K. B. Porter gave a mortgage on the said lands and other lands to the Confederation Life Association, as would appear by the abstract of the said lands produced.

7. Subsequently, namely, on the 21st May, 1906, the said James K. B. Porter gave a second mortgage to the International Harvester Company on the said south-east quarter of section 13, as appears by the abstract thereof produced.

8. The said James K. B. Porter has been in actual, continued, and uninterrupted possession of the whole lands since the dissolution of the partnership above referred to. The decision on this point, however, to be subject to proof of the facts stated, the plaintiffs having no knowledge of the same

9. On the 26th September, 1905, a deed from the Canada North-west Land Co. to the said William Porter and the said James K. B. Porter was executed, but never registered.

10. Prior to the 12th February, 1902, the said William Porter had given a mortgage on the south-west quarter of section 18 to the Canada Landed and National Investment Co. for $500.

11. In the year 1904 the said Canada Landed and National Investment Company commenced an action in this Court for foreclosure of the interest of the said William Porter in the said south-west quarter of section 18, and obtained a judgment in the said action, with a reference to the Master in the usual manner.

12. Under the direction of the Master, the plaintiffs in this action were served with a notice calling upon them to appear and prove their claim as subsequent incumbrancers, and to redeem the Canada Landed and National Investment Co., or have their interest foreclosed.

13. In December, 1904, the plaintiffs proved in the Master's office as subsequent incumbrancers for the full amount of their claim.

14. In May, 1905, the plaintiffs obtained an assignment of the mortgage of the Canada Landed and National Investment Co., and made application for the final order for foreclosure.

15. And in proving non-payment of their account, in order to obtain such order, proved only for the amount which was paid by them to the Canada Landed and National Investment Co. to redeem, namely, about $617, and a final order was thereupon granted to them. Paragraphs 11 to 15 inclusive are subject to the production of the papers in the said suit of the Canada Landed and National Investment Co., against Porter, for better certainty of the facts set out in said paragraphs.

16. In June, 1905, the plaintiffs sold the south-west quarter of section 18 to James K. B. Porter, a brother of William Porter, for $1,150, and were paid in full for the same.

17. The plaintiffs are now seeking to have the interest of the said William Porter in the south-east quarter of section 13 sold under the lien of the 12th February, 1902, to satisfy the balance alleged to be due to them under the said lien.

The following are questions which will be asked to be decided in this action:—

(1) Did the plaintiffs, by reason of their actions in the first foreclosure set out above, extinguish their right to proceed against the property in question in this action?

(2) Did James K. B. Porter obtain title by possession as against the said William Porter and his successors in title so as to exclude the plaintiff's claim against the property in question in this action, and can a tenant in common obtain title by possession against his co-tenant?

(3) Was there any right, title, or interest in or to the said lands, in said William Porter, to which the lien attached?

A. B. Hudson, for the plaintiffs.

H. A. Burbidge, for the defendant.

MATHERS, J.:—In my opinion, the plaintiffs did not by taking an assignment of the Canada Landed and National Investment Company's mortgage and foreclosing the same, and afterwards selling the foreclosed property, extinguish their right to proceed under their lien or charge against the property in question in this action, and therefore the first question submitted should be answered in the negative.

In 1902 William Porter, since deceased, gave the plaintiffs a lien or charge upon the south-west quarter of section 18 and the south-east quarter of section 13. On the former piece of land there was a prior mortgage in favour of the Canada Landed and National Investment Company, which mortgage the company proceeded to foreclose. The plaintiffs were served with a notice in the foreclosure proceedings, and proved their claim in the Master's office. Subsequently the plaintiffs took over the mortgage from the investment company, and completed the foreclosure proceedings by obtaining a final order of foreclosure, and then sold the property at a private sale.

It is contended that by doing so the plaintiffs have extinguished their right to proceed on the lien or charge, which covered not only the foreclosed property but also the south-east quarter of section 13. It is quite true that a mortgagee by foreclosing and subsequently selling the mortgaged property extinguishes his right to proceed for any balance that may be left on the sale of the mortgaged land; but that is not this case. The plaintiffs' charge or lien did not become merged in the mortgage on the assignment of the mortgage to them. It still remained a distinct debt, and, to my mind, all the remedies they were entitled to pursue with respect to it were still available to them. Their interest in the land under the lien or charge was not foreclosed, and could not have been foreclosed. Of course, by selling, their right to proceed against the sold property was gone, but all their rights against the unsold property, in my opinion, still continued.

The second question should, in my opinion, be answered in the affirmative. The stated case shews that James K. B. Porter went into possession of the south-east quarter of

section 13 in 1897, and that he has been in actual, continued, and uninterrupted possession of the whole land since that date. This piece of land had been bought by James K. B. Porter and William Porter as partnership property under an agreement of purchase. In 1897 the partnership was verbally dissolved, and, pursuant to the verbal settlement, James K. B. Porter took over this piece of land. The Statute of Limitations would begin to run in his favour in 1897, and since that time more than 10 years elapsed before the commencement of this action. The creation by William Porter of a lien or charge in the plaintiffs' favour in 1902 would not give the statute a new point of starting: Stackpoole v. Stackpoole, 4 Dr. & W. 347. The plaintiffs are successors in title to William Porter, and claim under him. If William Porter's claim is barred by the statute, it follows that the claim of the plaintiffs must also be barred.

The third question, as to whether there was any right, title, or interest in the lands in William Porter, on which the plaintiffs' lien might attach, cannot be satisfactorily disposed of on the facts in evidence. The land was bought by William Porter and James K. B. Porter as partnership property. It then became vested in them as such, and the title or interest that William had could not be conveyed to his brother by mere verbal agreement. It could only be conveyed by grant. The fact that James subsequently paid all the balance of the purchase money would not divest William of his title. It is admitted that the plaintiffs knew nothing about any verbal agreement by which this land in question was to become James's, and that they took and registered their charge for value and in ignorance of any such arrangement. It may be that by force of the registry laws the plaintiffs did acquire an interest, and possibly a greater interest than William had to grant; but, without a fuller statement of the facts, I do not care to express an opinion one way or the other, particularly as the case is disposed of by my answer to the second question.

MANITOBA.

DECEMBER 6TH, 1909.

COURT OF APPEAL.

REX v. LAW.

Criminal Law — Libel — Anonymous Letters — Question whether Written by Accused—Evidence—Comparison of Handwriting with Letters Admittedly Written by Accused —Evidence of Experts—Evidence of Ill-will towards Person Libelled—Motive—Judge's Charge—Reference to Similarity in Style—Misdirection—Evidence Improperly Admitted—Discharge of Accused.

Case stated by HOWELL, C.J.A., for the opinion of the Court of Appeal as follows:—

The prisoner was tried before me at the assizes holden at the town of Morden on the 28th and 29th days of October, 1909, and found guilty upon a charge of publishing defamatory libels, and was sentenced by me to a term of two months in gaol and to payment of a fine of $100, and in default of payment of such fine to a further term of one month's imprisonment.

An order was made by the Court of Appeal in the following form:—

It is ordered that a case be stated for the opinion of this Court under the provisions of sec. 1016 of the Criminal Code, and that such case be upon the grounds following, that is to say,—

1. Was evidence properly admitted to shew previous acts of bad character on the part of the prisoner, and in particular to shew that cattle had been poisoned, telephone wires cut, and bands of binder twine cut in the prosecutor's wheat field?

2. Was it misdirection to refer to such evidence when charging the jury, and to state to the jury that such evidence could be considered by them as evidence of motive?

3. Were the jury properly charged upon the evidence that handwriting can be so disguised as not to be discovered, and that the defence had put forward some new theory in that particular?

4. Was it misdirection to charge the jury that they might find the authorship of the libellous letters from the internal evidence and common expressions contained in the anonymous and admitted letters, and were the jury properly charged upon the question of parallel expressions in the two sets of letters?

5. Should not the jury have been charged that the posting of the letter of the 20th August, sworn to by Rogers, not being a letter set forth in the indictment, was no evidence of publication against the prisoner?

6. Was it misdirection to charge the jury that the evidence of the defence was that the same hand wrote all the letters, and that, if the prisoner published one of the letters, there was evidence that she published them all?

7. Were the jury misdirected upon the question of the reasonable doubt which is to be given to a prisoner?

8. Was it misdirection to tell the jury that, if the prisoner wrote the libellous letters, they might infer that she published them, and were the jury properly charged upon the question of publication, and was there any evidence of publication to go to the jury?

9. Should the jury have been instructed that it was their duty to give proper weight to the evidence for the defence, including that of the prisoner, and of the handwriting experts who testified in her behalf, and were the jury properly charged in reference to the evidence of the handwriting experts?

I submit the above questions set forth in the order, and pursuant to the order, for the opinion of the Court.

I hereby send to the Court of Appeal what purports to be the evidence taken at the trial and my charge to the jury. The charge in many respects is incorrect, and I fear the evidence is unreliable.

The case was heard by RICHARDS, PERDUE, and CAMERON, JJ.A.

R. M. Dennistoun, K.C., and J. R. Young, for the prisoner.

G. Patterson, K.C., for the Crown.

RICHARDS, J.A.:—The prisoner, Lucelle Belle Law, was tried at the last assizes at Morden, before the Chief Justice

of this Court and a jury, on a charge of having published certain letters containing libels upon another woman.

The libels were infamous, and were published concerning a woman of high moral character. It was proved, I think, that they were in fact published. The only question was whether they were published by the accused.

The jury found the accused guilty, and she was sentenced to be imprisoned in gaol for two months and to pay a fine of $100, and, in default of payment of the fine, she was to be further imprisoned for a month.

There was no direct evidence to shew publication by the accused. But it was sought to shew that the libels were in her handwriting. If that had been proved, I think the jury would have been justified in finding, from that and from the fact that they had been published, that they had been so published by the accused.

The question then reduces itself to whether there was evidence on which the jury were justified in finding, as the verdict implies that they did find, that the accused wrote the libels.

There was no evidence that any one had seen her write them, and no witness who knew her handwriting was called to prove that the writing in them was similar to hers.

The evidence for the prosecution was of two kinds:—

First, evidence given for the purpose of shewing that the accused bore ill-will towards the person libelled.

Second, evidence of expert witnesses, that they believed, from a comparison of the handwriting in the libels with the handwriting in two letters admittedly written by the accused, but not to the libelled woman, and not containing libels, that the same person who wrote the last mentioned letters had written the libels.

Under the first heading, the following evidence was given:—

(a) That cattle owned by the father of the libelled girl had died, and were thought to have been poisoned. No attempt was made to shew that the accused had caused the death of these cattle.

(b) That telephone wires connecting with the house of the libelled girl's father had been repeatedly cut. The only attempt to connect the cutting with the accused, was the evidence of a detective, who swore that he had traced

footprints from the place of one of these cuttings towards the accused's place of residence, and to within about a quarter of a mile of that place, and that he had measured these footprints and had found them to be the same size as the accused's footprints. He gave no other particulars to shew their identity.

(c) That the same detective had seen the accused cutting the bands of sheaves of grain owned by the girl's father.

(d) That the accused had on one occasion made faces at the girl; that on another occasion she had made an insulting gesture towards the girl, which gesture, however, did not suggest any of the charges in the libels, and that, on another occasion, she had looked rudely at the girl's feet; and that the detective had overheard the accused and another woman talking of the girl, and that one of them (he could not say which) had also used very indecent language about the girl.

There was some further evidence that the accused was not on good terms with the girl's father's family.

Two expert witnesses gave evidence on the second point, and stated their belief, from comparison of the handwriting in the libels with that in the letters admitted to have been written by the accused, that all were written by the same person.

For the defence, in addition to the denial of her guilt by the accused (which the jury need not have believed if they chose not to), two expert witnesses were called, who testified that, from comparison of the admittedly genuine letters with the libels, they were of the opinion that the two sets of letters were not in the same handwriting.

No expert evidence was called to shew any belief from similarity of style and language or expressions in the two sets of letters that the writer of one set was the writer of the other, and there were no witnesses to shew that any of the expressions in the libels were such as the accused was in the habit of using, either in conversation or in writing.

The learned trial Judge, in his charge to the jury, dwelt strongly upon the acts mentioned above under the first heading as shewing a motive for the publication, and told them that that motive might be considered by them as some evidence of publication by the accused. He suggested to the jury that they should give but little weight to

the evidence of the handwriting experts on both sides. He then took the libels and the admittedly genuine letters, and compared terms in the one set with terms in the other set, at very considerable length, and stated to the jury that, from such comparison, they could find that the accused wrote the libels.

The matter comes before this Court on a reserved case, which the Court directed to be submitted to it.

I am of opinion that the evidence above referred to, under the first heading, should not have been admitted, and that, after it had been given, the jury should have been charged that they should give no weight to it. It was merely evidence from which, at the most, an inference might be drawn that the accused cherished ill-feeling towards the girl. After drawing that inference, there would be no result unless they drew from it the further inference that the accused wrote the libels. It seems to me that such an inference as last referred to is too remote, and that the utmost that could be drawn from the evidence now under discussion, or any part of it, was a mere suspicion, which should not be admitted as evidence.

I do not discuss the handwriting expert evidence, as it seems plain that the jury did not consider it.

With the utmost deference, I am of the opinion that the learned trial Judge should not have drawn the attention of the jury to a comparison of style between the two sets of letters, as there had been no evidence, expert or otherwise, on that question.

The law seems to me to be correctly stated by Burton, J.A., and Osler, J.A., in Scott v. Crerar, 14 A. R. 152. The former says, at p. 160: "I wish not to be understood as agreeing in the view . . . that it was proper to ask a witness whether, from his knowledge of the style of the defendant, he was of opinion that the letter in question was writtten by him, and I dissent from the view that evidence of style, if admissible at all, is so otherwise than as expert evidence." He points out the uncertainty of comparison of handwriting by experts, and that, when it comes to a question of comparison of styles, the expert has to go further, and be able, not only to form a judgment as to resemblances, but as to whether the resemblances are genuine or imitations. He doubts whether such evidence should be admitted at all, but asserts that, if it is receivable, it must

be from a skilled witness. Mr. Justice Osler, at p. 164, takes a similar view of the law.

If the above views are correct, then I think, with all deference, that, though the jury could not have been prevented from comparing the writings when discussing their verdict, they should not have been charged that they should take that course, nor should the Judge have drawn attention, in his charge, to any resemblances of style.

I am further, with respect, of the opinion that the points of similarity, even if they might have been testified to, were not sufficiently strong to raise more than suspicion.

The case seems to me to come within the class of The Queen v. Winslow, 12 Man. L. R. 649.

Holding the above views, I cannot but come to the conclusion that there has been a mistrial.

I would quash the conviction and order the release of the accused.

As there is no ground to suppose that any further evidence would be produced on another trial, there does not seem any reason for ordering a new trial.

PERDUE, J.A.:—The accused, a married woman, was charged with having published a libel contained in certain anonymous letters affecting the character of a young woman, a neighbour of the accused. The indictment was laid under sec. 317 of the Criminal Code. The case was tried before Howell, C.J.A., at Morden, at the fall assize of 1909, and the accused was found guilty. A reserved case was stated for the opinion of this Court upon a number of grounds.

The libel in question was a most atrocious one, in which the vilest charges were made against a young woman of good character and respectability. The libel was of so diabolical a nature that any person convicted of such an offence would forever forfeit his right to associate with, or be even tolerated by right-minded people. The charge being so serious, it is all the more necessary to inquire whether the evidence was sufficient to convict the accused, and whether the trial was fairly and legally conduced.

Under sec. 317 of the Code, the publication of the libellous matter is the gist of the action. To establish publication it was sought by the prosecution, which in this case was conducted by a private prosecutor, to prove that the letters containing the libel were in the handwriting of the

accused, and that they had been published by being sent through the mail to various persons, leaving it to the jury to infer that the publication of the letters was made by the person proved to have written them. The jury might, no doubt, in such case infer the publication: Regina v. Lovett, 9 C. & P. 462; Rex v. Beare, 1 Ld. Raym. 414; Lamb's Case, 9 Co. Rep. 59.

In order to prove that the letters were in the handwriting of the accused, two experts were called by the prosecution, who, after having compared the letters with the admitted handwriting of the accused, gave it as their opinion that she had written them. As against this, two experts were called on behalf of the defence, who gave equally positive evidence that the letters in question had not been written by the accused. In addition to this the accused was called as a witness in her own behalf, and she denied positively that she had written any of them. There was no witness called by the prosecution who actually knew the handwriting of the accused. The only evidence to establish its authenticity as hers was the opinion of the two experts, after making a comparison between the admitted writing and that contained in the letters.

The learned Chief Justice cautioned the jury as to the danger of relying wholly upon the evidence of experts in handwriting, and stated that, if he were upon a jury, he would hesitate to convict upon expert testimony alone. I think he might have gone further, and have told the jury that where the experts called were equally divided in their opinions as to the writing being that of the accused, and where she denied upon oath that it was hers, the prosecutor had failed in establishing that the letters had been written by her.

The learned trial Judge, however, directed the jury to consider what was designated as internal evidence appearing in the admitted writing and the libellous matter. He pointed out certain peculiar expressions which occurred in both, and pressed the jury very strongly with the importance of the similarity of these expressions as evidence to prove that the same person had written both the admitted and the libellous letters.

There was no evidence by any expert or other person who had made a comparison of the documents for the purpose of expressing an opinion upon the alleged similarity of ex-

pression as affording proof that they were all written by the same person. In Scott v. Crerar, 14 A. R. at p. 163, Osler, J.A., expressed the view that such a comparison must be by experts or skilled witnesses. He pointed out that every objection which has been urged against professional evidence as to handwriting applies with ten-fold force where it is invoked to prove the style of the writer in habit of thought, construction of language, or turn of expression. Burton, J.A., was of the same opinion. I would add that, handwriting being peculiar to each individual, it is of much more importance for the purpose of comparison of documents than the language or expressions used therein, the peculiarities of which may be common to a whole family, or even community, or person, and may be copied or adopted without possibility of detection.

Where the prosecutor had failed to establish by the evidence of the witnesses that the accused had written the letters, I do not think that it was a safe and proper course to place the admitted writing and the libellous letters before the jury and leave it to them to find the fact upon a comparison of similarity of language or expressions, unaided by expert testimony, and without affording the defence an opportunity of meeting or rebutting such a case.

During the progress of the trial, and before any evidence had been given to connect the accused with the writing or publishing of the letters containing the libel, evidence was admitted of criminal or improper acts perpetrated against the father of the girl concerning whom the libel was published. These acts were the poisoning of animals belonging to him, cutting his telephone wire, and cutting the twine on sheaves of grain in his field. There was no evidence tending to prove that the accused was guilty of the first of these acts, but an attempt was made to connect her with the cutting of the wire. Evidence was given that she cut the twine on the sheaves. It is objected that this evidence of criminal or improper acts towards the father of the girl was improperly received, and, if such evidence came out during the trial, the jury should have been cautioned to wholly disregard it. The learned trial Judge left it to the jury to consider the evidence of the act of cutting the wire and cutting the sheaves as shewing a motive on the part of the accused for publishing the libel. It was also so left to the jury that they might be led to infer that the same person committed

all the above acts, and that such person was the one who published the libel.

The whole gist of the charge contained in the indictment was the publishing of the libel. It was not necessary in this case to prove malice, animus, or ill-feeling. The malice appears upon the face of the libel. The motive with which it was published is immaterial. If the accused published the libel, she was guilty of the crime charged in the indictment, and her motive in publishing it could neither increase nor detract from her guilt. No doubt, evidence of acts similar to the one charged in an indictment may be given in certain cases where it is necessary to prove the intention or state of mind of the accused, and to rebut by anticipation the defence of ignorance, mistake, accident, or innocent motive or intention: Makin v. Attorney-General for N. S. Wales, [1894] A. C. 57; Phipson on Evidence, 4th ed., p. 153. In all such cases, "proof aliunde, both of the main fact and of the connection of the party implicated, is a condition precedent to the admission of the evidence:" Phipson on Evidence, p. 153, citing Regina v. Francis, 2 C. C. R. 128, and other cases. In Regina v. Francis, Coleridge, C.J., said: "It seems clear upon principle that when the fact of the prisoner having done the thing charged is proved, and the only remaining question is, whether at the time he did it he had guilty knowledge of the quality of his act or acted under a mistake, evidence of the class received must be admissible."

In the present case the evidence of the criminal and improper acts against the father of the girl were given before any attempt was made to connect the accused with the publication of the libel. The alleged acts against the father were of a nature totally different from the offence for which the accused was being tried, and were alleged to have been perpetrated, not against the girl, but against her father. It is impossible to avoid the conclusion that the evidence of these acts was put in and used with great effect before the jury, in order to prove the main fact of the guilt of the accused upon the charge on which she was being tried, and not for any purpose for which such evidence could be legitimately received.

In Makin v. Attorney-General for N. S. Wales, supra, at p. 65, Herschell, L.C., said: "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than

those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible, if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused." See also The King v. Bond, [1906] 2 K. B. 389.

I think it is quite manifest that the real object which the prosecutor had in view in the present case was to lead the jury to believe that the accused was a person who had been guilty of other criminal acts against the father of the girl, from which they might draw the inference that the accused was the person most likely to have committed the offence charged in the indictment. Further, I cannot avoid the conclusion that the evidence would influence the jury adversely to the accused, and that they were led to regard it as an important element in establishing her guilt.

The evidence in question was let in without objection, but that does not preclude the accused from raising the objection before this Court, if the trial Judge failed to direct them that it was not legal evidence and that they were not to act upon it: The Queen v. Gibson, 18 Q. B. D. 537. No such direction was given in the present case.

I do not think that there was evidence to go to the jury upon which it would be safe, or proper, for them to find that the accused wrote or published the libel. I think the evidence relating to alleged prior criminal acts on her part was improperly admitted. The private prosecutor did not appear before this Court and ask for a new trial. The accused has already served more than half the term of imprisonment imposed. I think, therefore, she should be discharged.

CAMERON, J.A.:—The accused in this case was indicted for publishing defamatory libels under sec. 317 of the Criminal Code, which is as follows:—

"317. A defamatory libel is matter published, without legal justification or excuse, likely to injure the reputation

of any person by exposing him to hatred, contempt, or ridicule, or designed to insult the person of or concerning whom it is published.

"2. Such matter may be expressed either in words legibly marked upon any substance whatever, or by any object signifying such matter otherwise than by words, and may be expressed either directly or by insinuation or irony."

Under this section it is apparent that the essential ingredient of the offence is the publication.

[The learned Judge then set out the stated case, and proceeded:—]

I propose to consider together the matters involved in the first and second questions.

The alleged libel consisted of statements made in four anonymous letters reflecting upon a young woman, the daughter of James C. Stuart, a farmer, residing near La Riviere, in this province, who gave evidence at the trial. He was asked certain questions and answered them as follows:—

"Q. Will you tell the Court what happened same time as those anonymous letters? A. I lost three sheep and a dog and a very valuable mare.

"Q. Was anything on your premises then? A. My neighbour, Mr. Whitman, also lost a Berkshire sow that frequented my place.

"Q. In what time did they die? A. Within ten days.

"Q. What were the symptoms? A. Symptoms were those of poison."

No further evidence seems to have been offered upon this point.

Evidence was also offered and received shewing that telephone wires leading to Mr. Stuart's house were tampered with. This evidence is that of a detective, Albert Rogers, who swore that between 4 and 5 o'clock in the morning of the 21st August he found the wires cut about 100 yards from Stuart's house at a point where a person "standing on the top of the gulley" could cut the wires. There had been rain the night before, and Rogers found and measured tracks which led to the prisoner's residence. He measured these tracks with the prisoner's, and stated they compared exactly. References are made elsewhere in the evidence to the cutting of the telephone wires, but this is the whole of the evidence that goes to connect the prisoner with the act.

Upon the cross-examination of Rogers he stated that he saw the prisoner go into a field of Mr. Stuart and cut the twine on 23 sheaves. In answer to the Chief Justice, he said he saw the prisoner do this "the morning the wire was cut," the 21st August, between 6 and 7 in the morning.

It is to be noted that the charges purporting to be made by the evidence objected to are charges which, if established, affect the prisoner in relation to Mr. Stuart and not his daughter.

It is urged by counsel for the prisoner that this evidence is inadmissible either as evidence of character or of motive. The fact that this evidence was not objected to at the trial, and that in part it came out on cross-examination, seems immaterial. The prisoner cannot be convicted upon any but legal evidence: The Queen v. Gibson, 18 Q. B. D. 537; The Queen v. Long, 5 Can. Crim. Cas. 499.

So far as the prisoner's character is concerned, it appears clear that the prosecution cannot make evidence of bad character part of its original case, as it is not at that stage a fact either in issue or relevant to the issue. If evidence is given of good character in defence, then the prosecution is at liberty to rebut it. But no evidence on either side is admissible of particular acts or conduct on the part of the prisoner: The Queen v. Long, supra, pp. 489, 499.

The general rule of law is, that a person cannot be convicted in a proceeding of a criminal nature unless it can be shewn that he had a guilty mind. But it is impossible now to apply the maxim as to "mens rea" generally to all statutes, and it is necessary to look at the object and terms of each Act to see whether and how far knowledge or a particular intent is of the essence of the offence created: Archbold Crim. P. & E., pp. 33, 34, and cases there cited. In Duncan v. Pope, 80 L. T. 120, it was held that an intention to commit cruelty is no part of an offence under the Cruelty to Animals Act, 1849. Under sec. 317 above quoted, it seems to me that the motive by which a person is induced to publish or to form an intention to publish a defamatory libel is now immaterial.

Where the evidence is immaterial it must be excluded, and no other grounds of complaint or defence and no matters not necessary by law to establish those under trial can be proved: Phipson on Evidence, pp. 18, 130; Duncan v. Pope, supra; Regina v. Dyson, 18 Cox C. C. 1.

Under what circumstances is evidence admissible to shew that the accused has been guilty of criminal acts other than those charged in the indictment? This question has never been much discussed, and the authorities are not altogether uniform or consistent, but in two recent cases the guiding principles have been authoritatively laid down. In Makin v. Attorney-General for N. S. Wales, [1894] A. C. 57, Lord Herschell said: "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely, from his criminal conduct or character, to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible, if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused." His Lordship then proceeded to discuss the cases of Regina v. Geering, 18 L. J. N. S. 215, Regina v. Dossett, 2 Co. Rep. 306, Regina v. Gray, 4 F. & F. 1102, and Regina v. Oddy, 2 Den. C. C. 265, which he considers consistent with the principles above enunciated.

The King v. Bond, [1906] 2 K. B. 389, was a case stated for the opinion of the Court for the consideration of Crown Cases Reserved. The prisoner was charged with feloniously using certain instruments to procure an abortion, and evidence was tendered and admitted to shew that he had previously used similar instruments upon another woman with the avowed intention of bringing about her miscarriage. It was held by 5 of the 7 Judges composing the Court that the evidence was rightly admitted. Mr. Justice Kennedy states the general rule that in criminal as in civil cases the evidence must be confined to the point in issue. This general rule, however, cannot be applied where the facts that constitute different offences are at the same time part of the transaction which is the subject of the indictment. And the cases which form apparent exceptions to the general rule are, he says, "almost all cases in which evidence of transactions other than that which forms the subject of the indictment has been admitted as relevant to the issue as negativing the defence

of accident or mistake." Mr. Justice Bray said (p. 414): "A careful examination of the cases where evidence of this kind has been admitted shews that they may be grouped under three heads: (1) where the prosecutor seeks to prove a system or course of conduct; (2) where the prosecutor seeks to rebut a suggestion on the part of the prisoner of accident or mistake: (3) where the prosecutor seeks to prove knowledge by the prisoner of some fact." He illustrates the first class by referring to Blake v. Albion, 4 C. P. D. 94, and other cases. The evidence is then admissible because the other acts of which evidence is sought to be given when proved will shew the existence of the plan, and therefore the guilty mind of the prisoner. As illustration of the second class, the learned Justice cites Regina v. Geering, supra, and other cases. "The proof of each additional case increases the improbability of accident or mistake, and therefore tends to disprove it." The third class includes the cases of uttering counterfeit coin, where one act beyond that charged would tend to prove knowledge, and is therefore admissible.

Now, does the evidence as to the cutting of the telephone wires, the cutting of the bands of sheaves, and the poisoning of animals, admitted in this case, come within any of the above classes set out by Mr. Justice Kennedy and Mr. Justice Bray? It seems to me that it cannot, and that the admission of evidence tending to establish these charges is in violation of the rule laid down by Lord Campbell in Oddy's case, 20 L. J. M. C. 198, that the law of England does not allow one crime to be proved in order a raise a presumption that another crime has been committed by the perpetrator of the first, and of the same rule re-stated by the Privy Council in Makin v. Attorney-General for N. S. Wales, supra.

Where the state of mind of a party with reference to a transaction is material, all facts from which it may be inferred are, in general, evidence. Otherwise, however, where the intention is immaterial: Phipson on Evidence, pp. 127, 130. Facts similar to but not part of the main fact are inadmissible, in general, to prove its existence, and are rejected as tending to embarrass the inquiry with collateral issues, prejudice the parties with the jury, and encourage attacks with notice: p. 141. But similar facts, though generally inadmissible to prove the main fact or the connection of the parties therewith, are receivable after evidence aliunde on these

points has been given, to shew the state of mind of the parties with reference to such fact, or to explain its character, or for other collateral purposes. This, however, not to shew that, because the defendant has committed one crime, therefore he would be likely to commit another, but for the purpose of establishing the animus of the act, and rebut, by anticipation, the obvious defence of ignorance, accident, mistake, or some innocent motive or intention: ib., p. 153, where Makin v. Attorney-General for N. S. Wales and The King v. Bond, supra, and other cases, are referred to. But proof aliunde both of the main fact and of the connection of the party implicated, is a condition precedent to the admission of the evidence: Regina v. Francis, L. R. 2 C. C. R. 128.

As I have already indicated, the establishment of the charges arising out of the evidence objected to would disclose offences against Mr. Stuart of a character entirely different from those charged in the indictment, even if the writings therein set forth were libels against himself, which they are not. It seems to me, therefore, that the evidence now objected to should not have been admitted, or at least that the jury should have been charged to disregard it. Or it might have been advisable to discharge the jury and call in a new one in order to be certain that the damaging effect of evidence of that kind might be wholly eliminated from the trial. In any event, I am, with deference, of the opinion that the prisoner has been convicted on other than legal evidence, as it would be difficult to conclude that the jury had not been influenced by the evidence to which exception is taken.

Having come to this conclusion, I do not feel called upon to consider the other points raised by the stated questions. It seems to me that there was evidence as to the authorship of the disputed letters offered by the prosecution, which might be weighed by the jury against that offered by the defence. I confess I see force in the contention of counsel for the Crown that it was open for the jury to compare for themselves the disputed and admitted letters as to points of identity in handwriting and of similarity in expression, and to the trial Judge to comment on the latter. But there is no necessity for me to express a definite opinion upon this branch of the case or upon other subjects presented to us for our opinion.

My inclination is to order a new trial, but the other members of the Court think otherwise, and the conviction will be quashed.

MANITOBA.

NOVEMBER 29TH, 1909.

COURT OF APPEAL.

NEWTON v. REIN.

Bankruptcy and Insolvency — Assignment for Benefit of Creditors — Action by Assignee for Return of Goods Transferred by Insolvent before Assignment — Title of Transferee—Pledge for Advances—Conspiracy to Defraud Creditors.

Appeal by the defendant from the judgment of MACDONALD, J., 11 W. L. R. 363, in favour of the plaintiff.

W. H. Trueman, for the defendant.

G. D. Minty, for the plaintiff.

The Court (HOWELL, C.J.A., RICHARDS, PERDUE, and CAMERON, JJ.A.), dismissed the appeal, without calling upon the plaintiff's counsel.

MANITOBA.

NOVEMBER 30TH, 1909.

COURT OF APPEAL.

THOMPSON v. PEPPER.

Fraud and Misrepresentation — Exchange of Lands—Misrepresentations Relied on—Rescission of Conveyances — Damages.

Appeal by the defendant from the judgment of MATHERS, J., 11 W. L. R. 286, in favour of the plaintiff.

R. M. Dennistoun, K.C., and F. J. G. McArthur, for the defendant.

J. S. Hough, K.C., and A. C. Ferguson, for the plaintiff.

THE COURT (HOWELL, C.J.A., RICHARDS, PERDUE, and CAMERON, JJ.A.), dismissed the appeal with costs, without calling upon counsel for the plaintiff.

MANITOBA.

DECEMBER 2ND, 1909

COURT OF APPEAL.

ADAMS v. WOODS.

Municipal Corporations — Local Option By-law — Liquor License Act, sec. 62—Petition for Submission of By-law—Signatures—Detachment — Mutilation—Insufficiency — Injunction.

Appeal by the defendants from the order of METCALFE, J., ante 135.

E. L. Taylor, K.C., for the defendants.

A. J. Andrews, K.C., and F. M. Burbidge, for the plaintiff.

THE COURT (HOWELL, C.J.A., RICHARDS, PERDUE, and CAMERON, JJ.A.), dismissed the appeal with costs.

MANITOBA.

DECEMBER 8TH, 1909.

COURT OF APPEAL.

LARKIN v. POLSON.

Municipal Corporations—Local Option By-law — Petition for Submission to Electors—Insufficiency—Mutilation — Injunction.

Appeal by the defendants from the order of METCALFE, J., ante 144.

E. L. Taylor, K.C., for the defendants.

A. J. Andrews, K.C., and F. M. Burbidge, for the plaintiffs.

THE COURT (RICHARDS, PERDUE, and CAMERON, JJ.A.), dismissed the appeal with costs.

MANITOBA.

DECEMBER 12TH, 1909.

COURT OF APPEAL.

TIMMONS v. NATIONAL LIFE ASSURANCE CO.

Libel — Privilege — Express Malice — Interrogatories — Particulars—Practice.

An action for libel. Certain interrogatories were administered, and by order of the Referee they were struck out, and the following was ordered in lieu of them:—

"26. Give particulars of express malice charged by you, the plaintiff, against the defendants, as affecting the publication alleged in paragraph 2 of the statement of claim.

"27. Give particulars of express malice charged by you, the plaintiff, against the defendants, as affecting the publication alleged in paragraph 5 of the statement of claim."

This order of the Referee was appealed from, and METCALFE, J., made an order striking out the interrogatories and ordering in lieu thereof particulars as follows:—

"And it is ordered that the plaintiff do deliver to the defendants—

"(a) Particulars in writing of express malice charged by the plaintiff against the defendants, as affecting the publication alleged in paragraph 2 of the statement of claim.

"(b) Particulars in writing of express malice charged by the plaintiff against the defendants, as affecting the publication alleged in paragraph 5 of the statement of claim."

The plaintiff appealed from this order.

The appeal was heard by HOWELL, C.J.A., RICHARDS, PERDUE, and CAMERON, JJ.A.

B. L. Deacon, for the plaintiff.

H. A. Robson, K.C., for the defendants.

HOWELL, C.J.A.:—In the argument of the case, the defendant relied upon Cooper v. Blackmore, 2 Times L. R 746, and upon Lever Bros. v. Associated Newspapers, [1907] 2 K. B. 626. The practice of administering interrogatories

and of asking for particulars, it seems to me, is being carried out to such a length that they are used to cripple the opposite party, rather than to assist the party asking for them.

The particulars granted by the learned Judge by the last mentioned order, are particulars of malice. Now, what can that possibly mean? Is it the size or shape or intensity of the malice. I think the particulars ordered could not possibly be given.

It was argued that what the defendants wished to know was the acts and conduct of the defendants from which the plaintiff intended, at the trial, to urge that at the time the libel was written the party was actuated by a bad mind. It is sufficient in this matter to say that these are not the particulars ordered, and this appeal can be disposed of by simply saying that it is impossible to give the particulars.

The interrogatories 10 to 25 were interrogatories asking if the plaintiff did certain acts. Whether he did or did not do these acts, is not in question in this suit. The pleadings only raise the question as to whether or not the defendants honestly believed that the acts were committed. The truth or falsity of it has nothing to do with the matter. Mr. Robson but faintly attempted to support these interrogatories, indeed he practically abandoned them on the argument, as I think he properly should have. The interrogatories 10 to 25, both inclusive, will be struck out, and the order made by Mr. Justice Metcalfe, in so far as it directs the particulars to be given, will be set aside, and the appeal allowed with costs.

PERDUE, J.A.:—It was admitted on the argument that interrogatories 10 to 25 were bad, as they relate to justification of the libel, and no justification has been pleaded. The question involved in this appeal is whether the particulars directed to be furnished by the order of Metcalfe, J., were properly ordered. By that order the plaintiff was directed to furnish the following:—

"(a) Particulars in writing of express malice charged by the plaintiff against the defendants, as affecting the publication alleged in paragraph 2 of the statement of claim."

"(b) Particulars in writing of express malice charged by the plaintiff against the defendants, as affecting the publication alleged in paragraph 5 of the statement of claim."

The alleged libels were contained in letters written from the defendants' head office to their manager in Winnipeg, and reflected upon the plaintiff, who had been in the defendants' employ as an agent. The defendants set up that the communications in question were privileged. In order to meet the course which, the defendants anticipate, the plaintiff will take, namely, endeavour to prove that the defendants were actuated by express malice so as to overcome the defence of privilege, the defendants sought to administer interrogatories to ascertain the particulars of the express malice intended to be proved. For these interrogatories, the order of Metcalfe, J., substituted the above particulars, which the plaintiff was ordered to furnish. Where it is necessary that the plaintiff should prove express malice so as to defeat a plea of privilege, or of fair comment, it is legitimate for him to interrogate as to the steps or precautions taken, the inquiries made, and the information obtained by the defendant before publication: Annual Practice, 1910, p. 439. Interrogatories in such a case would relate to facts in the possession of the opposite party, and not in the possession of the party administering the interrogatories. Here the defendants seek to obtain particulars relating to a state of mind existing, or alleged to exist, in their own agents or officers, whose conduct might bind the defendants.

The King's Bench Act, Rule 311, provides that "where it is material to allege malice, fraudulent intention, knowledge, or other condition of mind of any person, it shall be sufficient to allege the same as a fact, without setting out all the circumstances from which the same is to be inferred."

Actual malice, in a case like the present, is a state of mind to be inferred by the jury from the acts, conduct, or expressions of the defendant, or of persons whose acts, conduct, and expressions are binding on the defendant. Such malice may be shewn by what takes place during the progress of the trial, and may be disclosed by those persons while they are giving evidence. The state of mind of the defendant, or of such persons as bind the defendant by what they do, should be within the knowledge of the defendant rather than within the knowledge of the plaintiff. It does not appear to me to be a case where a plaintiff should be tied down by particulars of a state of mind in the opposite party which he may hope to establish largely by cross-examination of the defendant's witnesses during the progress of the trial and

by their demeanour while in the witness box. This appears to be the view embodied in the latest authorities. In Odgers on Libel and Slander, 4th ed., p. 600, it is stated that "the defendant is not entitled to particulars of express malice." This is laid down to be the rule in a case like the present, where actual malice is sought to be proved by the plaintiff in order to meet and overcome a defence of qualified privilege. This is fully borne out by the decision of the Court of Appeal in England, in the case of Lever Bros. v. Associated Newspapers, [1907] 2 K. B. 626. In that case the defence was justification of the allegations of fact in the words complained of, and, in so far as such words were comments, that they were fair comments made in good faith and without malice, upon the facts, which were matters of public interest. The defendants administered the following interrogatory: "Do you intend to set up that the defendants, in publishing the words complained of, were actuated by express malice towards the plaintiff? If yea, generally state the facts and circumstances on which the plaintiff relies as shewing actual malice." This was held to be inadmissible, because it was asking the plaintiff how he intended to conduct his case at the trial. Fletcher Moulton, L.J., pointed out that the first part of the interrogatory was highly objectionable, and that, as the latter part depended upon the first part, the whole was inadmissible. It appears to me that exactly the same objections appear in the order for particulars in this case. The plaintiff need not shew express malice except for the purpose of defeating the defence of privilege. The defendants in the present case take the ground that they are entitled to anticipate that the plaintiff will endeavour to shew express malice at the trial of the action, although the plaintiff may not so endeavour, and to call for particulars in respect of a matter which may not come in issue. This would be in effect to ask the plaintiff if he intends to raise this issue at the trial, and how he intends to prove it.

I think the appeal should be allowed and the order for particulars set aside, and that the order of the Referee made on the 24th September, 1909, should be set aside except in so far as it relates to interrogatories numbers 1, 2, 4, and 5. The costs of this appeal, and of the appeal to Metcalfe, J., should be costs to the plaintiff in any event of the cause. There should be no costs in respect to the order of the Referee.

CAMERON, J.A.:—This is an action of libel. A defence is pleaded of qualified privilege. By the order appealed from, the plaintiff was ordered to deliver to the defendants "particulars in writing of express malice charged by the plaintiff against the defendants as affecting the publication alleged" in the statement of claim. In the opinion of the Chief Justice of this Court, the wording of the order given above is entirely too vague and uncertain to be acted upon, and the appeal should be allowed as to this part of the order on this ground; and in this I concur.

To a plea of qualified privilege a special reply is unnecessary if malice be alleged in the statement of claim (as in this case) or negatived in the defence; the formal averment in the statement of claim that the words were spoken maliciously takes a new meaning and becomes an allegation of express malice: Odgers on Libel and Slander, p. 600. The defendants are not entitled to particulars of express malice. It is never necessary, or indeed permissible, to set out the evidence by which the plaintiff hopes to establish malice at the trial: Glossop v. Spindler, 29 Sol. J. 556; Order XIX., r. 22; Odgers, p. 582. The English Rule is identical with our Rule 311. See the Annual Practice, 1910, p. 290. Lever Bros. v. Associated Newspapers, [1907] 2 K. B. 626, is in point. The argument of counsel for the plaintiff, p. 627, was, it would seem, adopted by the Court.

The defendants practically abandoned the portions of the order appealed from referring to interrogatories numbered 10 to 25, which upon the pleadings could not be upheld.

I think the appeal must be allowed, that the interrogatories in question, numbers 10 to 25, must be disallowed, and the order for particulars made by Mr. Justice Metcalfe set aside. The whole of the order of Mr. Justice Metcalfe will be set aside, and the order of the Referee discharged, except as to interrogatories Nos. 1, 2, 4, 5, with costs of this appeal and of the appeal to Mr. Justice Metcalfe, to be costs in the cause to the plaintiff in any event of the cause.

RICHARDS, J.A., concurred.

MANITOBA.

DECEMBER 15TH, 1909.

COURT OF APPEAL.

COWARD INVESTMENT CO. v. LLOYD.

Principal and Agent—Agent's Commission on Sale of Land—Failure to Prove Contract of Employment as Agent — Failure to Procure Purchaser Able to Carry out Purchase —Evidence.

Appeal by the plaintiffs from the judgment of MACDONALD, J., 11 W. L. R. 338, dismissed the action.

H. M. Hannesson, for the plaintiffs.

A. B. Hudson, for the defendant.

THE COURT (RICHARDS, PERDUE, and CAMERON, JJ.A.), dismissed the appeal.

MANITOBA.

DECEMBER 15TH, 1909.

COURT OF APPEAL.

ROWES v. CHRISTIE.

Vendor and Purchaser — Contract for Sale of Land—Purchase Money in Part Payable by Conveyance of other Land—Option of Payment in Cash—Election—Evidence —Delay.

Appeal by the defendants from the judgment of METCALFE, J., 11 W. L. R. 565, in favour of the plaintiff.

A. C. Galt, K.C., for the defendants.

J. H. Leech and F. J. Sutton, for the plaintiff.

THE COURT (RICHARDS, PERDUE, and CAMERON, JJ.A.), dismissed the appeal, without calling upon counsel for the plaintiff.

MANITOBA.

DECEMBER 20TH, 1909.

COURT OF APPEAL.

McKINLEY v. FRANK.

Vendor and Purchaser—Option for Purchase of Land—Payment of Sum Agreed upon as Consideration—Condition not Fulfilled—Cancellation—Evidence.

Appeal by the plaintiffs from the judgment of MACDONALD, J., 11 W. L. R. 571, dismissing the action.

E. A. Cohen and R. W. McClure, for the plaintiffs.

A. E. Hoskin, K.C., for the defendant.

THE COURT (RICHARDS, PERDUE, and CAMERON, JJ.A.), dismissed the appeal, without calling on counsel for the defendant.

MANITOBA.

MATHERS, J. DECEMBER 20TH, 1909.

SINGLE COURT.

DOMINION EXPRESS CO. v. CITY OF BRANDON.

Injunction — Application for Interim Order Restraining Municipal Corporation from Levying Tax—Right to Recover Amount if Paid under Protest.

Application by the plaintiffs for an interim injunction.

The defendants made a levy against the plaintiffs for a business tax for 1908; the plaintiffs resisted payment, on the ground that they paid a license fee under the provincial Act for the taxation of companies; and that they were not liable to taxation by municipalities, as the provincial law gave them the right to do business in any part of the province.

J. P. Foley, for the plaintiffs.

R. M. Matheson and A. B. Hudson, for the defendants.

MATHERS, J.:—A Court of equity should not grant an injunction to restrain the action of the taxing power, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no remedy by the ordinary process of law: Joyce on Injunctions, sec. 1189.

In Dows v. City of Chicago, 11 Wall. 108, Field, J., said: "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers upon whom the duty is devolved of collecting the tax may derange the operations of government, and thereby cause serious detriment to the government. No Court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no remedy by the ordinary process of law." That seems to me to be sound doctrine.

In the present case the plaintiffs have brought this action for a declaration of right, and for an injunction. If the declaration is made in their favour, they will, as a matter of course, be entitled to an injunction to restrain the defendants from levying the tax if they attempt to do so. The plaintiffs could have got exactly the same relief in a properly framed action after paying the money demanded under protest.

Before the action has been tried. however, the plaintiffs ask for an interim injunction to restrain the defendants from, in the meantime, collecting a tax apparently regularly assessed against them. The plaintiffs are only entitled to this relief if they would have no adequate remedy for the recovery of the money in the event of the Court deciding that the tax was illegal.

The plaintiffs relied upon the case of Central Vermont R. W. Co. v. Town of St. John, 14 S. C. R. 288. That was a Quebec case, and, so far as appears, the injunction was granted only after the petition was tried on the merits. It was not an application for an interim injunction pending the determination of the plaintiffs' right.

In Heard v. Ashville, 24 S. E. R. 738, it was held that an injunction will not go to restrain the collection of taxes where there is an adequate remedy at law to recover the money back. And in United Lines Telegraph Co. v. Grant, 137 N. Y., it

was held that the sheriff will not be enjoined from collecting a tax, on the ground that the Act under which the tax is levied is unconstitutional, as, the process in such a case being null, the sheriff is a trespasser, and the plaintiff has an adequate remedy at law against him.

That the plaintiffs would have the right to recover this tax, if paid under protest, is settled by Canadian Pacific R. W. Co. v. Municipality of Cornwallis, 7 Man. L. R. 1.

In my opinion, the plaintiffs are not entitled to an interim injunction.

The motion must be dismissed, with costs in the cause to the defendants in any event.

MANITOBA.

MATHERS, J. DECEMBER 20TH, 1909.

TRIAL.

SUTTON v. HINCH.

Landlord and Tenant — Lease of Farm — Rent Payable by Share of Crops—Seizure of Crops by Landlord—Conversion of Tenant's Share—Breach of Covenants—Cancellation of Lease — Counterclaim for Instalment of Purchase Money of Land — Assignment of Agreement — Amendment—Costs.

Action for wrongful conversion.

A. C. Galt, K.C., for the plaintiff.

A. E. Hoskin, K.C., and J. T. Huggard, for the defendant.

MATHERS, J.:—On the 1st March, 1908, the defendant leased for one year to the plaintiff, by an indenture of lease, section 32 in township 5, range 3, west of the principal meridian in Manitoba, except 100 acres in the south-east quarter leased to one John Reid, 125 acres leased to one H. Van-Koughnet, and 14 acres reserved by the lessor. The rent reserved was one-third in kind, as the same came from the threshing machine, of all wheat, oats, barley, and other grains, and of the hay grown upon the demised land during the term. All wheat, except such part, if any, as the lessor required for seed, was to be delivered, as soon as might be after threshing

thereof, at an elevator or in cars at Myrtle or Homewood on the Canadian Northern Railway or at Graham station on the Midland Railway, in the name of the lessor, and the lessor's share of all other grains grown on the land was to be delivered, as required by the lessor, at Carman. The wheat so delivered was to be sold by the lessor, and the proceeds of the lessee's share were to be paid by the lessor to the lessee, after deducting any threshing bill or other costs and charges against the crop, and any other debts which the lessee owed to the lessor, and especially $200 for which the lessor had indorsed the lessee's note for the purchase price of seed grain.

All hay grown on the land was to be properly cut, cured, and stacked thereon, and the lessor's share was to be delivered by the lessee on the land. The hay was to be measured, and the lessor was to have his choice of stacks, and, after he had indicated his choice, such stacks were to become the property of the lessor.

Then followed covenants by the lessee to pay the rent in kind as the same came from the machine and the hay on the land, on the days and times and in the manner mentioned and appointed, without any deduction or abatement.

The lessee also covenanted to cultivate, till, manure, and employ the land in a good husbandlike and proper manner, so as not to impoverish it, and to use his best and earnest endeavours to rid the land of all docks, wild mustard, stink weed or French weed, red roots, Canadian thistles, sow thistles, and other noxious weeds, and especially to prevent the sow thistles from going to seed or spreading on the land.

He was also to give the lessor, or his duly authorised agent, at least 5 days' notice in writing of the time when he would commence to thresh; also to furnish the lessor, immediately after the grain or any part thereof was threshed, a certificate of the owner or manager of the threshing machine which threshed the grain, shewing in detail the day that such grain was threshed, the number of bushels of the different kinds of grain threshed, and the charges for threshing, and that the threshing had been paid for by the lessee.

There was also a provision that the lessee should fall plough in a good and sufficient manner, and according to the best methods of fall ploughing, as many acres as were then ploughed, namely, 30 acres more or less, and, if the fall ploughing was not done, the lessee was to pay to the lessor $2.50 per acre for deficiency, and the lessor might retain

sufficient from the lessee's share of the grain to pay for the fall ploughing and the other costs and charges.

Also that the lessee was to do 4 days' road work.

There were also a number of other covenants on behalf of the lessee, but, as there is no further complaint with respect to any of them, they need not be further referred to.

The lease contained the usual proviso for re-entry if the rent or any part of it should be in arrears after the 1st November, and for breach of any of the covenants. The lessor covenanted with the lessee that, he paying the rent and performing the covenants, he should peaceably and quietly hold and enjoy the premises during the term, without any molestation, hindrance, or disturbance of or from the lessor or any person claiming under him.

The plaintiff went into occupation of the land and raised a crop of wheat, oats, and barley upon it. The harvesting season of 1908 was somewhat unfavourable, and he was unavoidably delayed in threshing until the latter end of October. The wheat was then damp, and certainly not in good threshing condition, owing to the recent rains, but, as there was a probability of it getting worse instead of better by delay, it was decided to thresh it. Threshing was finished on the 24th October. Afterwards, but on the same day, the defendant caused the plaintiff to be served with two written notices, one notifying him that he had broken the covenants and conditions contained in the lease, and that the defendant did, by the powers contained therein, cancel the same and declare it to be null and void, and demanding $200 compensation, and the other demanding that the plaintiff forthwith deliver up possession to the defendant.

This was on Saturday, and on the Monday following the plaintiff hauled 4 loads of wheat to an elevator at Myrtle, and deposited it there in his own name. On Tuesday morning the bailiff arrived with a writ of replevin issued from the County Court at Carman, at the suit of the defendant, and replevied the entire crop of wheat, oats, and barley on the farm to the defendant. The defendant placed one VanKoughnet in charge, and had the wheat and barley delivered at Homewood, and the oats at Carman, to his own order.

After the seizure of the grain by the defendant, the plaintiff left the farm and did not return to it.

On the 17th November, 1908, the County Court Judge of Carman made an order setting aside the writ of replevin and

releasing the grain replevied under it. The defendant did not return to the plaintiff any of the grain or the proceeds thereof, and this action was then brought for the wrongful taking of his grain and a few other small items of account.

The issue of the writ of replevin by the defendant appears to have been without a shadow of justification, and it was most properly set aside by the County Court Judge. However, in the meantime, the defendant had got the entire crop of the plaintiff into his own hands. After it was set aside the plaintiff does not appear to have made any demand for the restitution of the crop to him, as he had a right to do, and the defendant did not tender its return.

I find that the quantity of wheat grown by the plaintiff on the farm and threshed was 1,776 bushels. To pay the threshing bill the thresher took 246 bushels. The plaintiff took 294 bushels, and there was left on the farm when the bailiff seized 1,236 bushels. I find that the defendant, by his bailiff, seized this amount of wheat, and the thresher afterwards accounted to him for 21 bushels. He is, therefore, accountable for 1,257 bushels of wheat. By the terms of the lease the defendant was entitled to one-third or 592 bushels. He therefore got 665 bushels more than his share, for which of 83 cents, would amount to $551.95. The defendant says he is liable to the plaintiff. This, at the then current price he only got 698 bushels of wheat, but I find that there were 1,236 bushels on the farm when his bailiff admittedly seized all there was, and he was responsible for its safety from that time, and he got the proceeds of 21 bushels from the thresher afterwards. There were 229 bushels of barley threshed, of which the defendant took all. He was entitled to one-third or 76⅓ bushels. He, therefore, got 152⅔ bushels to which the plaintiff was entitled, which, at 37 cents, the then fair market price, would amount to $56.48. The total oats threshed were 807 bushels. The defendant's one-third would be 269 bushels. He took 727 bushels, so that he got 458 bushels more than his share. These, at 28 cents, the fair market price, would amount to $128.24.

In addition the defendant admits that he owed the plaintiff $47.60 for certain meals and horse feed. The plaintiff claims $27 for expenses from Mason City, Iowa, but I cannot find that he has made a case for the recovery of this sum. Neither can I find that he has made a case for the allowance

of special damages, beyond the value of the grain seized, for the wrongful issue and execution of the writ of replevin.

I find, therefore, the plaintiff entitled to recover as follows:—

For wheat	$551 95
For barley	56 48
For oats	128 24
Meals, etc.	47 60
Total	$784 27

The defendant counterclaims for a note for $211 which is admitted. He also, by his pleading, alleges breaches of every covenant in the lease, but he only attempted to prove a breach of a few of them.

In the first place, it is complained that the plaintiff did not cultivate the land in a good and husbandlike manner. The wording of this covenant is, "that the lessee will during the said term aforesaid cultivate, till, manure, and employ such part of the said demised premises as is not (manifestly "now" is the word intended) or shall hereafter be brought under cultivation in a good husbandlike and proper manner, so as not to impoverish the soil." There was no evidence on which I could find that by the plaintiff's manner of cultivation the soil was impoverished, and I find, therefore, that this covenant was not broken.

The same may be said as to the covenant relating to cutting thistles and other noxious weeds. The land was much overrun with sow and Canadian thistles when the plaintiff leased it, and it was not intended by either party that the plaintiff should resort to other means of cleaning it than by cutting the thistles. I find that the plaintiff performed this covenant not literally but in the sense in which both parties understood he was to perform it.

At the time the defendant assumed to cancel the lease the plaintiff had only fall ploughed about 6 acres, and that but indifferently, whereas he had covenanted to plough 30. There was no evidence that the ploughing season had passed when the defendant turned the plaintiff out of possession. So far as appears from the evidence, there was still ample time to perform this covenant, and its non-performance was probably due to the defendant's act in ousting the plaintiff from possession of the land, and thus rendering it impossible for the plaintiff to comply with his covenant.

I find that all the hay that was worth cutting was cut and stacked on the land; not, it is true, by the plaintiff, but by one VanKoughnet, who in doing so was a trespasser. By the terms of the lease the plaintiff was to do no other act of delivery. The defendant had the choice of stacks, and it was for him to make a selection. If he did not do so, and allowed VanKoughnet to remove all the hay, he has but himself to blame. It is quite evident the plaintiff did not get any of the hay, except what was used by him during threshing.

The season of 1908 was a very wet season. It appears that either the grain stacks were not properly built, or the tops were blown off some of them, and the rain allowed to penetrate. During the threshing the wheat was allowed to run into the wet ground.

There is no covenant of which this conduct could be construed as a breach. The defendant relied upon this covenant relating to good husbandry, but that covenant is confined to cultivation in a manner not to impoverish the soil. I therefore find against the defendant's counterclaim on this point.

The plaintiff did not perform the statute labour, by reason of which the defendant's land was charged with $5 which he was compelled to pay.

In all particulars other than those I have specially mentioned, I find that the plaintiff duly performed his covenants, except in a few minor respects, from which no damage resulted to the defendant.

The defendant further claims the right to recover an instalment of $823.57, principal and interest, payable under an agreement for the sale by the defendant to the plaintiff of a farm on the 9th November, 1907. It was, however, shewn that on the 16th January, 1908, the defendant had, by instrument under seal, assigned this agreement to one Miller, who was still the holder of it and entitled to the moneys payable thereunder.

That is a complete answer to the defendant's claim. It is, however, pointed out that by the instrument of assignment the defendant has guaranteed to Miller the payment of the several instalments payable under the assigned agreement. Ordinarily the defendant would have a right to ask the Court to compel the plaintiff to pay Miller: Ascherson v. Tredegar Dry Dock Co., [1909] 2 Ch. 40, 78 L. J. Ch. 697. He could not, however, recover the money himself, because the plain-

tiff has not covenanted with him to pay Miller. He has covenanted to pay the defendant, but the defendant has assigned this covenant to Miller. This distinguishes this case from Culllin v. Rinn, 5 Man. L. R. 8.

The defendant applied to amend his counterclaim so as to claim payment of this overdue instalment, as surety for the plaintiff, or to compel the principal debtor to pay the creditor, as was done in Ascherson v. Tredegar Dry Dock Co. For the reasons already mentioned, I am of opinion that the defendant has no right to recover this money from the plaintiff as surety or otherwise. The plaintiff makes two answers to the alternative amendment asked for: first, that it would be making an entirely new case which he is not prepared to meet; and second, that Miller has cancelled the agreement for default, and the notice of cancellation is put in evidence. It may be that Miller cannot now be compelled to receive payment. For these several reasons, I am clearly of opinion that this is not a case for an amendment, and I therefore refuse it.

I find the plaintiff entitled to $784.27, and the defendant on his counterclaim to $216. There will therefore be judgment for the plaintiff for $568.27 and costs of suit and of the counterclaim, except in so far as it relates to the non-performance of statute labour and the $211 note. I allow no costs of the counterclaim to the defendant except the costs relating to the non-performance of statute labour and the note for $211.

MANITOBA.

MACDONALD, J. DECEMBER 20TH, 1909.

CHAMBERS.

JOHNSON v. CHALMERS.

Attachment of Debts—Affidavit to Lead Garnishing Order—Practice—Departure from Forms Prescribed—Rule 760—"Deductions"—"Discounts"—"Jointly"—"Justly."

Appeal by the plaintiff from an order of the Referee setting aside an order attaching moneys alleged to be due to the defendants by the Crown Life Insurance Co., garnishees.

Blake (Rithwell, Johnson, and Bergman), for the plaintiff.

Jamieson, for the defendants.

MACDONALD, J.:—The ground upon which the learned Referee set aside the order is that the affidavit upon which the order was granted is defective in that it does not follow the words of the Act.

Paragraph 4 of the affidavit reads as follows: "In respect of the said cause of action the defendants are *jointly* indebted to the plaintiff in the sum of $800.80, after making all just *deductions.*"

The word in the form being "discounts" and not "deductions," it is held that this departure from the prescribed form is fatal.

Rule 760 of the King's Bench Act provides for forms numbered respectively 32 and 33 in the schedule to the Rules, or to the like effect.

Prior to the decisions in the cases cited in which it was held that a strict compliance with the wording of the Act was imperative, there was no Rule similar to Rule 760, no provision for affidavits in the forms prescribed "or to the like effect."

Language may, under the existing Rules, be used following the words of the statute or to the like effect.

The question here is, does the word "deductions" convey the same meaning, is it to the same effect, as the word "discounts?"

"Deduction" is defined as that which is deducted or subtracted: Oxford Dictionary.

A deduction being the taking of the subtrahend from the minuend, a subtraction: Words & Phrases.

Discount is defined, "to reckon as an abatement or deduction from a sum due or to be accounted for, to abate, to deduct; to reduce the amount of a debt by a set-off:" Oxford Dictionary.

It seems to me the two words in the sense in which they could be used here convey the same meaning, and are within the qualifying words of the section, "to the like effect."

The use of the word "jointly," however, or the omission of the word "justly" is the more serious defect; it is con-

tended that this is an error in typewriting; that the word intended was "justly" and not "jointly." It may be that the word "jointly" was intended and the word "justly" omitted. It is such a defect as cannot be amended.

I dismiss the appeal with costs.

MANITOBA.

METCALFE, J. DECEMBER 23RD, 1909.

TRIAL.

ISBISTER v. DOMINION FISH CO.

Negligence—Ship—Carriage of Passengers and Luggage — Fire Occurring on Ship — Destruction of Luggage and Personal Injuries to Passenger — Escape from Ship by Jumping into Water—Justification—Evidence—Proof of Negligence—Damages—Costs.

Action for damages for personal injuries sustained by the plaintiff and loss of goods, owing to the negligence of the defendants, as alleged.

N. F. Hagel, K.C., and H. P. Blackwood, for the plaintiff.

F. Heap and A. R. Stratton, for the defendants.

METCALFE, J.:—The defendants, during the summer of 1908, owned and operated, as common carriers, the steamer "Premier" upon Lake Winnipeg. The plaintiff is a nurse. Her brother is a Hudson's Bay factor, who resides in the country north of Lake Winnipeg, and whose children were then living in Selkirk. For the purpose of taking these children to visit their father, the plaintiff took passage as far as Warren's Landing, and thence northward to her brother's home. After some time she returned with the children to Warren's Landing, and there awaited the arrival of the steamer "Premier" from Selkirk. After the steamer arrived, it was moored to the wharf. She boarded the steamer to journey back to Selkirk, and was assigned two state-rooms, one for herself and one for the children.

The plaintiff had in her possession, and brought with her on the boat as baggage, the following personal effects:—

2 suits of clothing at $25 each	$ 50
Hats	20
Dressed furs worth	100
Caperine	25
Bedclothes	30
Dress goods and calico	50
Total	275

Also a valuable gold watch and chain, a present from her brother. She was unable to state its actual value.

These goods were burned in a fire on the steamer.

It is a defence to this action that the plaintiff was not a passenger, but subsequently the evidence appeared to disclose that arrangements had been made for payment of her fare by the Hudson's Bay Co., in some manner peculiar to themselves for their employees and their relatives; and counsel for the defendants abandoned that defence.

The rooms assigned to the plaintiff faced the lake on the opposite side of the boat from the wharf. The boat was moored to the wharf preparatory to starting on the following morning on the return journey to Selkirk. From time to time the passengers arrived, and were assigned berths. The plaintiff put the children to bed, and then retired to her own room, going to sleep as usual. The other passengers retired. Every one appears to have been asleep, and all was still. About half past 12 o'clock that night there arose a cry of fire. The passage-way in the upper deck was filled with smoke and flames. So bad was the conflagration, and so quickly was the boat burned after it was discovered, that some were unable to escape, and were burned.

The plaintiff says she was awakened from her sleep by hearing a cry of fire. She at once jumped out of bed and ran into the room where she had left the children. She found they were not in the bed. After searching under the bed and around the room she satisfied herself that they must have been rescued, and ran to her own state-room door for the purpose of escaping down through the passage and out on to the deck. The passage was filled with flames and smoke; her hair caught on fire and she was driven back into her own state-room by the heat and smoke. She shut her door and

then climbed out of the window on to the promenade deck. evidently hoping to escape around the deck and perhaps on to the dock. She saw, however, that the flames were bursting outwards on both sides of her on the deck. It was impossible to get around, and no avenue of escape was left for her except the open lake.

The tug "Ideal" had been, during the night, moored alongside of the "Premier." This tug was still close to the burning ship and some one shouted to her to jump. While she hesitated, Forrest, the mate of the "Premier," who was the only officer or employee of that ship who is shewn to have retained his presence of mind, or who did anything in the slightest degree towards saving either the ship or the passengers, got alongside of the plaintiff and told her to jump. While she was on the rail hesitating he pushed her into the lake. There was no time for formalities. There was no other avenue of escape.

The plaintiff fell into the lake alongside the tug. She could swim and was able to keep herself afloat. In a few minutes she was pulled into the tug. In falling into the lake the plaintiff struck against the fender of the tug and sustained the injuries complained of.

No direct evidence is given as to how the fire occurred. The evidence, however, seems to point to the fact that at the time the fire was discovered it was burning in the passage and bursting outwards through the upper deck. The fuel used to feed the boiler consisted of tamarac wood. A large quantity of this wood had been loaded on to the ship and ran across the gangway from door to door.

The witness Fryer, a purser on the ship, says that the wood was piled across this passageway so high that you could not got from bow to stern.

Delaney, a passenger who came on the ship that night, says that the wood was piled across breast high. There is no doubt, therefore, that there was a large quantity of wood in the vicinity of the boiler room for the purpose of being used as fuel during the return journey on the lake.

There was a fire in the boiler.

Delaney says that when he came on the boat at about half past eleven they were taking ashes out of this fire; that he saw the sparks snap out when the firemen left the door open to get more wood. He says the floor of the boiler room was covered with bark and chips.

The witness Couture, who was a cook for the Dominion Fish Co. at Warren's Landing, went to the "Premier" that night with his wife. She was to journey on the "Premier" to Selkirk. He went on board with his wife about 11 o'clock and left at about 12 o'clock. He says the passageway was so blocked with cordwood that they had to go by the bow through a small hatchway; that there were too many chips lying around that boiler room, and that, if a spark flew out, it would be quite likely to set fire to the chips and get into the bulkhead; that the bulkhead was very dry and liable to catch fire; that, when he was leaving at 12 o'clock, he saw a light reflected on the dock, which reflection appeared to come from the engine-room, and which he thought was the fire reflected from the boiler-room by reason of the door of the fire box being open; that all was quiet on the boat when he left; that he heard the alarm of fire about an hour afterwards; that he then looked out of his window and the boat was all wrapped in fire. His wife perished in the flames.

The witness Hicks says that he was an engineer on the boat until a short time before it burned. He says that while he was on the boat it caught afire twice in the boiler room, and that he helped to put it out. The material part of his evidence on this point is as follows:—

"Q. Where was the fire? A. Right forward by the boilers at the fire-hole.

"Q. In the stoke-hold? A. Yes.

"Q. What caused it? A. Oh, I can't tell; a spark of coal rolling out of the ash-pan; slack dampers; no hinges burning wood. The stoke-hold is a most dangerous place, I consider. It needs watching.

"Q. What caused this fire? A. Fire rolling from the ash-pan; what happens to roll out; in taking out ashes and not having sufficient water."

The trial Judge:—

"Q. Do you say that you should keep it wet? A. Yes, but a pail was out of the question, most of the time.

"Q. Did you speak to the chief engineer about it? A. I spoke to him both times, but it had never been put there.

"Q. What? A. A water pipe or water to put the fire out.

"Q. There was none there? A. No. No water there. You had to get it from the other water.

"Q. You say it is a proper thing to keep it wet? A. It is, under the United States Inspection Act.

"Q. Outside of that, is it reasonable? A. I would think it necessary.

"Q. Listen to the question: Do I understand you to say that it was a proper thing to keep that place wet or damp? A. Yes."

Mr. Blackwood:—

"Q. There was no pipe there? A. No. There was no way of getting water. For the purpose of getting water you had to go to the deck and get a hose or a pail or some other way of communication."

It does not clearly appear whether or not the statutory requirement as to pumps was complied with. It is beyond question, however, that not one drop of water went through a pump or hose either to put out the fire or so to retard it that the passengers might be assisted in escaping. Forrest says he gave the signal to work the steam pump, but there was no response. His evidence indicates that there was a steam pump which could be worked from the engine-room, but that its connections with the hose were destroyed by fire, and that it, therefore, would not work.

At all events, no water came.

The defendants contend that there has been no proof of negligence, or that, if there was negligence, there is no proof that such was the proximate cause of the fire. It is said that the boat may have caught fire from a spark from the tug "Ideal," or that some passenger may have dropped a lighted match or cigarette, or that an incendiary may have set fire to the ship; and very strongly urge that in many other ways the fire might have occurred without their fault or negligence.

Upon a careful consideration of the facts, and taking into consideration all the probabilities, I think the ship caught fire in the stoke-hold, and that the wood piled in the gangway caught fire, and a great conflagration then took place which extended upward through the ship. There is no doubt there was a fire in the boiler with steam up preparatory to leaving in the morning. When the witness Couture left, he saw a reflection which he thought at the time proceeded from the open door of the boiler. This reflection might well have been the result of a fire at that time burning in the stoke-hold. The fact that, when Forrest signalled for the pump in the engine-room to start operations, the connections were destroyed by fire, indicates that the fire was then raging fiercely in the stoke-hold. The general conflagration of the ship at

the time of the first discovery of the fire indicates that it had been burning for some considerable time, and the fierceness of the flames might well be attributed to the fact that an immense amount of fuel was burning within the ship such as would reasonably be expected if the tamarac cordwood had in the first place caught fire. The fact that fire had previously occurred in the stoke-hold, and the evidence generally, indicate that the stoke-hold was dangerous, and fire liable to occur therein. If, as I believe, the fire occurred in the stoke-hold, then I must hold that the defendants were negligent.

If, however, the fire did not occur in the stoke-hold, but primarily through the negligence of the defendants, I think the defendants are clearly guilty of negligence in permitting a fire to consume the vessel without making any reasonable attempt to stop its progress or to inform the passengers of their danger.

Common carriers of passengers are bound to use all due, proper, and reasonable care to carry passengers safely.

Under the circumstances here, where the ship itself is of inflammable material, and where there is a fire within the ship, it is, I think, only reasonable that a watchman should be on duty, during the hours when passengers are ordinarily asleep, to care for the fire and the boiler, and also, in case a fire occurs, to alarm the crew and passengers, so that immediate steps can be taken to insure, not only the safety of the ship, but the safety of the passengers. Immediately upon the discovery of the fire, I think it is the duty of the crew to take reasonable steps to insure the safety of the passengers. In this case, either no watchman was on duty, or, if on duty, he must certainly have been neglectful, otherwise the crew and passengers would have been aroused in time to have at least insured the safety of the passengers. The lamentable fact that the ship burned to the water's edge before all the passengers could escape, and that those who were saved barely escaped with their lives, indicates a neglect of duty sufficient, I think, to make the defendants liable.

The plaintiff says that, after being taken out of the lake, she was so excited and so cold that she did not realise the extent of her injuries; but when she was taken to a house and got warm she suffered pain.

She says that before the accident she was strong; that since that she has been miserable; that she has been trying to work, but that her back is so weak she cannot work; that

she has tried several times to work, but that her nerves have been in such a condition that she has always broken down and had to quit; that before the accident her eyesight was good, and that since the accident her eyesight has been bad. She says that as a nurse she earned $15 per week as standard charges, and was frequently paid more, and that, with the exception of a few days, she was practically employed all the time; that for 6 months after the accident she was totally unable to work, and then was compelled by necessity to try; that she worked for 3 weeks and broke down.

The plaintiff is a trained nurse, who has been engaged in that business for about 10 years. Before the accident she was strong and able to carry out her duties. Doctor Grain, of Selkirk, says that he has known her 10 or 12 years, and that he has attended the family; that prior to the accident she was in good health; that he saw her shortly after she had been brought to Selkirk after the accident, and attended to her, and that she seemed in a nervous condition and suffered a great deal. He says he thinks the coccyx was broken (at any rate it was then loose), and that there seemed to be internal injuries, the nature of which he could not positively ascertain. He says he has attended her off and on since; that before the accident she was in good health; but has not been the same since the accident. He says that he has known her well; that he cannot trace the present symptoms to any other source than the accident, and that he attributes the injuries to the accident. He thinks she is somewhat better now than she was, but says the fact of her losing her eyesight is unfavourable. While he admits that the coccyx could be removed by an operation, he thinks it impossible to tell if her condition could ever be cured. He says that, while she was quite fitted for nursing before the accident, she has not been in a fit condition to nurse since.

Doctor Ross says that he saw the plaintiff on the boat after being brought to Selkirk. She seemed to be suffering from the lower portion of the spine and also had pain in the side. He had sent her home and made a more careful examination and found partial dislocation of the coccyx; that he examined her afterwards, and concluded that there was no great amount of bodily injury otherwise. He says that injury to the coccyx might have serious effect on the nervous system; that it might last for months and might affect the

constitution; and that its after effect might be a nervous affection.

Doctor Burnham, who was consulted as to her condition, says that an operation might relieve the condition of the spine. He says it would probably do away with the sensitiveness of the spine, but might not cure her nervous condition.

I was impressed with the truthfulness and honesty of the plaintiff as she gave her testimony in the box. I think she has been entirely incapacitated since the accident from carrying on her occupation as a nurse. She says that when she tries to do any work of that nature she breaks down because of nervous trouble. This, I think, may quite reasonably be attributed to the accident. I think she was justified in jumping as she did from the boat: Burns v. Joyce, 1 Stark. 493; Halsbury's Laws of England, vol. 4, p. 46. And I think the defendants are liable for the injury sustained.

Considering the loss of the goods and the injuries to the person of the plaintiff, the suffering and medical attendance, the subsequent loss of time, and the very serious probability that the plaintiff may never again be able to engage in her calling, I am of the opinion that she should have substantial damages.

There will be judgment for the plaintiff for $4,000 and costs, not to be limited by statute.

MANITOBA.

METCALFE, J. DECEMBER 23RD, 1909.

TRIAL.

SCHWEIGER CO. v. M. VINEBERG CO.

Sale of Goods—Action for Price—Contract—Goods not Delivered in Time—Refusal to Accept—Right to Reject the Whole because Part not Delivered—Trade Custom—Delivery of Larger Quantity than Ordered—Bill of Lading—Retention.

Action for the price of goods sold. Counterclaim for damages for breach of contract.

H. Phillipps and W. J. Chandler, for the plaintiffs.

A. E. Hoskin, K.C., and P. M. Montague, for defendants.

METCALFE, J.:—The plaintiffs are a company with head office at Vienna, Austria, and evidently carry on business in a large way as manufacturers' agents. The M. Vineberg Co., the defendants, are general merchants, carrying on business at the city of Winnipeg.

On or about the 4th March, 1904, the plaintiffs' traveller, Mr. Altman, being then in Winnipeg, took from the defendants several orders, each upon a separate order form, and each marked with a separate number.

Amongst other orders he took the following: 3118, for certain silk mufflers or head scarfs; 3119, for linens, buttons, and pipes; 3142, for one sample collection of knitted mufflers, to amount to 100 kroners, or about $20.

These orders were written out by Mr. Altman in an order book, and were not signed by the defendants. A copy of the order was taken from the book, however, and handed to the defendants in each case, and these orders, with the correspondence afterwards, it it admitted, form a contract sufficient to satisfy the Statute of Frauds.

After taking order 3118, Steinberg, the manager of the defendant company, asked Mr. Altman to increase the number of dozen of the different mufflers ordered. Altman had not at that time his copy of the order with him, but did increase the amounts upon the copy retained by Steinberg, and also wrote upon Steinberg's copy of the order a further item of 10 doz. silk mufflers at 30 kroners per doz. Order 3118 thereupon became an order for: 75 doz. mufflers at 12.50 kroners; 50 doz. mufflers at 20.50 kroners; 40 doz. mufflers at 15 kroners; 10 doz. mufflers at 30 kroners..

It is admitted that a kroner is about 20 cents Canadian money.

The goods were to be shipped from Vienna via Antwerp, C. P. R.

On the original order form it was provided that the goods were to be shipped in June. The plaintiffs on the 5th May, 1904, wrote to the defendants a letter, a copy of which is as follows:—

"Vienna, 5th May, 1904.

"Mr. M. Vineberg,

"Winnipeg.

"Dear Sirs:—A few weeks ago I received, through Mr. S. Altman, your order No. 3118 for mufflers, No. 3119 for linens, No. 1320 for briar pipes, No. 3142, for samples of mufflers, for which I am much obliged and which I put immediately on receipt. The major part of the goods ordered is now ready, and the entire lot shall be shipped in a few weeks. Enclosed I beg to hand you copies of orders, and I wish to state that all endeavours will be made to satisfy you in every respect.

"Trusting to be soon favoured with your repeat orders, I remain, dear sirs,

"Yours truly,

"pr. pro. Alois Schweiger.

"A. Singer."

Enclosed in this letter were the copies of orders. In these copies of orders the time as to shipment was referred to, not as of June, but in the following words, "Shipment as soon as possible." On the 17th May, 1904, before the receipt of the letter of the 5th May or the copies of orders, the defendants wrote to the plaintiffs a letter in which the defendants said, "Kindly try and ship the goods ordered from Mr. Altman by us before July if possible." This referred to the goods mentioned in the above orders.

About the 9th July, and on account of order No. 3118, the plaintiffs delivered, at Vienna, to the carriers, case No. 9300. In this case was packed the 75 doz. mufflers, the 50 doz. mufflers, and the 40 doz. mufflers. The 10 doz. mufflers ordered at 30 kroners were not packed in this case. There was, however, in the case a sample collection of silk mufflers, to the value of about $80. This, with the above mentioned items, was the total contents of case No. 9300.

The plaintiffs delivered, at Vienna, to the carriers, about the 23rd July, a case, No. 9630, in which were packed 22 doz. mufflers similar to the 10 doz, ordered.

The plaintiffs contend that this 10 doz. was subsequently increased verbally by the defendants to 22 doz. This is denied, and I cannot find a contract for the extra 12 doz. mufflers.

To fill order 3119 the plaintiffs delivered to the carriers, at Vienna, on the 25th July, 1904, case No. 10624, containing the buttons. And subsequently delivered a case for the balance of order 3119, namely, the linens and pipes. This latter case, was, however, stopped by the plaintiffs at Antwerp before they had knowledge of the defendants' refusal to accept the goods.

Cases 9300, 9630, and 10624 were subsequently taken to Antwerp and were shipped, via C. P. R., and arrived in Winnipeg on or about the 13th September, 1904. The bills of lading for these goods were forwarded to the defendants, and were retained by the defendants until the trial of this action.

Some time elapsed before the goods reached Antwerp from Vienna, and on the 20th August the plaintiffs wrote the defendants, and in that letter said, amongst other things: "With reference to your order No. 3119 for mufflers and pearl buttons, and No. 3118 for mufflers, we beg to inform you that the same have been shipped by the C. P. R. 'Lake Michigan' from Antwerp to your address. 14th August, as per enclosed bill of lading."

On the 3rd September, 1904, the defendants wrote to the plaintiff as follows:—

"Winnipeg, Man., Sept. 3rd, 1904.

"Mr. Alois Schweiger,

"Vienna, Aust.

"Dear Sir:—We have just received your invoices for goods shipped on Aug. 16th, and are sorry that, if you would look up the copy of orders from Mr. S. Altman, you will see that these goods were to be shipped in June, so as to have them here for the fall trade. We therefore can not accept these goods under any consideration, and would ask you to kindly dispose of them, and oblige,

"Resp. yours,

"The M. Vineberg Co.

"per M. S., manager."

The defendants persisted in their refusal to accept the goods, and the same were sold by the Customs.

The defendants contend:—

1. That all these orders were part of one general order, and that, by reason of the non-delivery of a portion, they may reject the whole.

2. That, even if the orders are separate orders, the goods purchased have not been delivered.

In so far as order 3119 is concerned, I have no hesitation in finding that the goods were not delivered. A portion of the order was stopped at Antwerp, and never came forward.

In so far as order 3118 is concerned, the defendants contend:—

1. That they received more of the different classes of mufflers than were ordered.

2. That the samples were not ordered, and ought not to have been included.

3. That the absence from the package of the 10 doz. mufflers justified them in refusing to accept delivery.

4. That the 10 doz. being mixed with 12 doz. other mufflers, they were justified in refusing to accept delivery of the 10 doz.

They raise a further point that these mufflers were invoiced to them at 39 kroners, whereas, in fact, they were ordered at 30 kroners. I think the defendants are right in this contention.

In so far as the extra quantity of the mufflers ordered is concerned, it is explained that these goods are manufactured by a print from a web, and it is the custom of the trade, when ordering goods to be specially manufactured (as these were), for the manufacturer to ship forward the exact number of shawls or mufflers that are made by the print from the whole web, and that, because of the peculiar nature of the manufacture, it is customary and convenient for the merchant who buys direct from the manufacturer to accept the total output of the web, notwithstanding that it may vary to some extent from the exact quantity ordered. The evidence shews that this custom prevails, is reasonable, and is well known.

I cannot find from the evidence that the samples included in case 9300 were the samples referred to in order 3142. They seem to be a different quality of goods entirely and are of about 4 times the amount. There may have been some talk between Vineberg and Altman as to sending such

samples, and I am inclined to believe that there was, but I do not think that I can find any contract, binding upon the defendants, to force them to accept these samples.

I think the sellers delivered to the buyers a quantity of goods larger than they contracted to sell, and also that they delivered to the buyers goods which they contracted to sell, mixed with goods of a different description not included in the contract, and that the buyers are, under sec. 30 of the Sales of Goods Act, entitled to reject the whole.

Having elected to reject the goods, and having communicated their rejection to the plaintiffs, I do not think, in view of the subsequent facts, that the retention of the bill of lading creates any liability.

I do not think the defendants have shewn damage under their counterclaim.

I dismiss the action with costs, and the defendants' counterclaim with costs.

MANITOBA.

METCALFE, J. DECEMBER 23RD, 1909.

TRIAL.

DRURY v. DART.

Contract—Money Paid for Interest in Land—Syndicate — Change in Contract — Absence of Assent — Return of Moneys Paid—Evidence.

Action to recover money paid by the plaintiff for an interest in a syndicate formed for the purpose of purchasing certain property.

C. P. Wilson, K.C., and J. F. Fisher, for the plaintiff.

G. A. Elliott and I. A. McKay, for the defendants.

METCALFE, J.:—The plaintiff and the defendants are dealers in real estate at Winnipeg. The defendants Mc-

Millan and Vollans are partners. The parties, before the transaction in question, had had business dealings with each other, more or less of a similar nature to the transaction in question.

In March, 1907, the defendant Dart conceived the idea of forming a syndicate for the purchase from Blackwoods Limited of the whole Portage avenue frontage lying south of Portage avenue and between Colony and Vaughan streets in the city of Winnipeg. Having ascertained that the same could be bought for $200,000, he interviewed the defendant Vollans, who appears to have acted for the firm of McMillan & Vollans. It was then agreed between Vollans and Dart that Dart would proceed to syndicate the property, and Dart thereupon, for the purpose of forming a syndicate, and in the meantime securing the property, on the 25th March, 1907, procured from the Blackwoods a 25-day option on the property, which option was, by instrument in writing, bearing date the 15th April, 1907, subsequently accepted by the Blackwoods Limited and by Dart. Such acceptance acknowledges the payment of $1,000 already paid for the said option and $9,000 paid on the 15th April, 1907.

The price was to be payable as follows: cash $10,000; on the 19th April, 1907, $56,866.66, if conveyances were then prepared; if not, upon the date of preparation and tender of conveyances; and the balance in 3 equal annual instalments, amounting to $133,133.33, making in all $200,000.

Dart says that, upon obtaining the option, he started in to syndicate the property, and divided it into sevenths; that he then gave his cheque for $9,000, and Mr. Vollans gave him his firm's cheque for $5,000, or one-half; that a Mr. Powell, who had taken a one-seventh interest, became ill and said he would need the money; that he had mentioned this property to Mr. Drury; and that, when Mr. Powell dropped out, he shewed Mr. Drury a blue print of the property, pointing out the advantages of the Colony street corner and its wide frontage on Colony street; he pointed out to Mr. Drury that dividends which he, Dart, was then paying him from his share in a similar syndicate, would take care of his liability, and that, if Drury would give a note for his share, McMillan & Vollans could get it discounted, and it could be paid out of these dividends, and induced Mr. Drury to take a one-fourteenth interest.

By cheque bearing date the 21st May, 1907, Drury paid $761.91, and gave his note for the balance of $4,000 to James A. Dart, which note was indorsed by McMillan & Vollans, and Drury thereupon received a receipt, signed both by James A. Dart and McMillan & Vollans, a copy of which is as follows:—

Winnipeg, May 21st, 1907.

Received from E. Drury the sum of four thousand seven hundred and sixty-one dollars and ninety-one cents ($4,761.-91) as follows:

Cheque	$761 91
Note due July 1st.....	4,000 00
Making total as above.....	$4,761 91

Re one-fourteenth interest in property known as the Blackwood estate running from Vaughan to Colony streets on Portage avenue, being first payment of the proportion as above on a total purchase price of $200,000, one-third cash being paid to the vendors. This receipt to be forfeited when trust deed is supplied.

J. A. Dart,
McMillan & Vollans.

Dart and Drury appear to have been friendly and to have seen each other almost every day. Mr. Dart says he thinks he had arranged with Mr. Drury to come in some time before the cheque and note were actually given. Drury, on the other hand, says that he concluded the agreement with Dart only a few days prior to his giving the cheque. He is quite positive on that point, and I think that Drury and Dart made an agreement about the 21st May, 1907.

In the meantime Dart had paid on account of this purchase to the Blackwoods as follows: on the 25th March, 1907, $1,000; on the 16th April, 1907, $9,000; on the 6th May, 1907, $31,666.67.

It would thus appear that at the time that Drury came into the syndicate, Dart and McMillan & Vollans had paid to Blackwoods $41,666.67 of a total of $66,866.66, without having got title, and that they required immediately a large balance under the option and its acceptance. This balance had to be arranged by McMillan & Vollans and Dart in order to carry out the purchase. The money paid had been

largely obtained from other members of the syndicate, upon the understanding that they were to have an interest in the property. Dart and McMillan & Vollans at that time were liable to the members of the syndicate either to obtain the interest in the property for them or to return them their money. It thus became, at the time that Drury was admitted, very essential for Dart and McMillan & Vollans to raise money, or get others in the syndicate.

About the time that Drury came into the syndicate, money became tighter, and the real estate market flattened out somewhat. Later on money became still tighter, and the real estate situation more gloomy, and Dart, being unable to raise sufficient money to carry out the deal with Blackwoods, and, no doubt, realising his liability to the members of the syndicate, arranged with the Blackwoods to divide the property agreed to be purchased, the Blackwoods retaining two-sevenths and the syndicate purchasing five-sevenths. This was arranged between Blackwoods and Dart, by a division being made, and, actually dividing the property, they retaining the Colony street frontage. Dart arranged, however, with the Blackwoods, and subsequently obtained, an option on this portion for one year.

Dart then saw Drury, and says that he explained the matter to him; that Drury then asked him if it made any difference in his interest, and Dart said it made no difference in his financial interest. Drury, on the other hand, says that Dart came to him and told him that Blackwoods were retaining a two-sevenths interest, and thereupon, I think, a misunderstanding arose. and while, no doubt, the matter was clear in Dart's mind. that the property was to be divided, and that Blackwoods were to have two-sevenths of the property, I believe that Drury thonght that the Blackwoods were coming in and taking two-sevenths interest in the syndicate.

Several witnesses, in giving their evidence in the box, referred to Blackwoods coming in and taking a two-sevenths interest. I think Drury was justified in assuming that the Blackwoods themselves were taking a two-sevenths share.

After some delay a meeting was called of the members of the syndicate to close up the matter with Blackwoods, and at the last moment it appears that McMillan refused to assume the liability of the covenants and the mortgage. Dart saw Drury and notified him of the meeting. He asked him

particularly to be present because of McMillan's attitude, and asked him to be sure and bring the receipt of the 21st May, so that McMillan and the other members of the syndicate would see that McMillan & Vollans had signed the receipt, and that they should assume, with Dart, the liability of the covenants. The members of the syndicate met in Mr. Hugg's office, and Mr. Drury brought with him the receipt. Each member of the syndicate had had the matter explained to him before he came to the meeting, and Mr. Drury says he went there more particularly because Dart had asked him to bring the receipt. He said he was, and still is, a friend of Mr. Dart, and that when Mr. Dart told him that his interest would not in any way be affected, he relied upon that and took no further interest in the details.

It appears that at this meeting a discussion arose as to whether McMillan should or should not join in the mortgage, and also over commission. Mr. Drury says that these matters did not interest him, and that he was more or less a passive spectator, and that after a while he asked if there was any further need of his staying, and he was told there was not, and he then left.

It is said by some of the witnesses that at this meeting the matter was thoroughly explained to all those present, and some of the witnesses say that they understood thoroughly that the property was to be divided. It is not shewn, however, that any such explanation took place while Drury was present at the meeting.

No one seems to recollect clearly exactly what did take place at the meeting, and I do not think that I can accept any such inferential recollection as against Mr. Drury's positive, and, I believe, honest, statement that he always understood from Mr. Dart that the new arrangements with Blackwoods would in no way affect his one-fourteenth interest in the property.

Afterwards the deal with Blackwoods was carried through. The property was divided, and a portion was transferred to Dart and McMillan & Vollans, and afterwards transferred by them to a straw man for the syndicate, who gave a mortage back to Blackwoods for the unpaid balance on the portion so transferred.

The papers were not registered until November, 1907. Some time in October, 1907, Drury, having heard from Mr. Hugg that all was not according to his idea, called upon

Dart at the Clarendon hotel, and he then became positively aware that Dart's understanding was not the same as his own. He thereupon, on the 4th November, 1907, wrote a letter to Dart and McMillan & Vollans as follows:

Winnipeg, November 4th, 1907.

Mr. Jas. A. Dart and Messrs. McMillan & Vollans,
Merchants Bank Building,
City.

Gentlemen:—

I beg to notify you my payment of notes given re Blackwood property in favour of the Traders Bank, and indorsed by you, is not to be construed as an acknowledgment that value has been received or conditions under which notes were given have been complied with by you. Payment of said notes is simply without prejudice to any action I may find it necessary to take in order to recover, enforce my rights, or protect my interests in regard to share in Blackwood property on which you received from me $4,761 more or less on May 21st last.

Yours truly,

E. Drury.

On the 3rd March, 1908, he again wrote to Dart and McMillan & Vollans, calling their attention to the fact that they had not yet carried out the agreement to give him a one-fourteenth interest in the whole of the property, and notifying them that that agreement must be carried out on or before the 4th April,, 1908, and that, in default, he would call upon them for a return of the money with interest and damages for a breach of contract.

Thereupon Mr. Hugg, who was then acting for Dart and McMillan & Vollans, wrote a letter to Drury of the 4th April, 1908, as follows:

Winnipeg, 4th April, 1908.

E. Drury, Esq.,
c/o V. C. Maddock,
McIntyre Block, City.

Dear Sir:—

With reference to your letter addressed to James A. Dart, Neil T. McMillan, Robert Vollans, and McMillan & Vollans, dated the 3rd day of March, 1908, we are instructed to in-

form you that the registered owner of the property mentioned in your letter, is prepared to carry out the agreement entered into between you and the persons to whom your letter is addressed. We are writing this letter to confirm a conversation which our Mr. Hugg had with you, in which he notified you of the fact above mentioned, and in which you consented to give a few days time for the completion of the documents, after the date mentioned in your letter.

Yours truly,

Hugg & Kelly.

An arrangement was then made with Blackwoods whereby the Blackwoods were to treat each member of the syndicate separately for his own share of the whole of the Portage avenue frontage. Agreements were thereupon drawn between the Blackwoods and the individual members of the syndicate, including an agreement to the plaintiff, for an undivided one-fourteenth interest in the whole of the Portage avenue frontage, and these agreements appear to have been executed by the Blackwoods.

A meeting of the syndicate was then held for the purpose of each member of the syndicate paying the moneys required as a cash payment on the agreements and executing and receiving their agreements.

It appears that McMillan & Vollans refused to make their payment, and, apparently through no fault of the plaintiff, the arrangement was not carried out, and subsequently the property was sold by Blackwoods under the mortgage given by the straw man, and by an apparent arrangement has become vested, three-fifths in the defendant Dart, and two-fifths in C. H. Enderton, another member of the syndicate.

I think that when the defendants received the money from the plaintiff, they received it upon the condition that they were to obtain him a one-fourteenth interest in the whole property or to return him his money. The property has been so transferred and dealt with that they cannot now obtain for him such interest. They have not only lost under the mortgage sale the property which they did purchase, but they have lost and forfeited their rights under the option to the property retained by Blackwoods on Colony street.

As the defendants cannot now give him the property, the plaintiff clearly has the right to the return of his money,

unless he agreed to the subsequent division. Any such agreement might easily have been set forth in writing or by a resolution. The parties, however, have not seen fit to do this. There does not seem to be a scratch of a pen to indicate any agreement. Not having executed or in any way entered into an express agreement, written or otherwise, is the plaintiff estopped from demanding his money? I cannot find, after carefully considering the facts and circumstances, that the new contract with Blackwoods was so understood by the plaintiff Drury as to cast upon him a duty to object to its consummation.

The plaintiff gave his evidence in a clear and satisfactory manner, and I believe him to be honest when he says that he did not know of the division of the property until a few days before he had the interview with Dart at the Clarendon hotel. He immediately afterwards saw his solicitors, with the result that he wrote the letter of the 4th November, 1907, and the subsequent dealings corroborate his testimony.

I think the plaintiff is entitled to a return of his money, together with interest from the date of demand.

There will be judgment for the plaintiff with costs.

BRITISH COLUMBIA.

HUNTER, C.J. DECEMBER 23RD, 1909.

CHAMBERS.

RICHARDS v. VERRINDER.

Security for Costs—Plaintiff Temporarily out of the Jurisdiction—Intention to Return.

Motion by the defendants for an order for security for costs.

H. D. Helmcken, K.C., for the defendants.

W. J. Taylor, K.C., for the plaintiff.

HUNTER, C.J.:—In this case the plaintiff is suing named persons, who are members of the examining board of the

Dental College of British Columbia, for damages for fraud and conspiracy to prevent him being admitted as a member of the profession, by misreporting his examination papers, and the defendants apply for security for costs on the ground of his being resident out of the jurisdiction.

The affidavit filed on behalf of the defendants makes out a prima facie case, as it shews that he is practising as a dentist in Seattle since November last; but the plaintiff files an affidavit in answer stating that he was born and brought up in Victoria; that he is only temporarily resident in Seattle, and intends to again present himself for examination to be admitted to practise in British Columbia; and that his home is in Victoria, where a large part of his personal belongings are situate. This affidavit, therefore, shews that he is ordinarily resident within the jurisdiction, and is only temporarily absent until he can get admitted to practise in British Columbia, and that his temporary absence is really due to the fact that by the action of the defendants he is compelled to make his living outside the jurisdiction in the meantime. If the plaintiff fails to present himself for examination again within a reasonable time, that may be good ground for renewing the application, but I think the present application must be refused, without prejudice to any future application that may be made.

In the circumstances, the costs will be costs in the cause to the plaintiff.

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BRITISH COLUMBIA.

CLEMENT, J. DECEMBER 28TH, 1909.

CHAMBERS.

TIMMS v. TIMMS.

Husband and Wife—Petition by Wife for Judicial Separation —Practice—Divorce Rules—Ex Parte Motion for Directions as to Trial, Husband not Appearing in Answer to Citation—Absence of Affidavit Denying Collusion—Necessity for Filing Citation with Certificate and Affidavit of Service.

Motion ex parte by petitioner for directions under the Divorce Rules, No. 21, as to mode of trial.

The petition was filed by the wife, seeking a decree of judicial separation, but her affidavit filed with the petition did not comply with sec. 41 of the Matrimonial Causes Act, 1857, 20 & 21 Vict. ch. 85 (Imp.), as repeated in No. 3 of the British Columbia Divorce Rules, inasmuch as it did not state that no collusion or connivance existed between the petitioner and her husband, the respondent. Upon this petition a citation issued, and the husband was personally served. He entered no appearance.

Brydone Jack, for the petitioner.

CLEMENT, J.:—This motion for directions is now made ex parte, and in that respect is, I think, quite regular. The Rules are silent upon the point, but the citation clearly warns a respondent that in default of appearance "a Judge of our said Court will proceed to hear the charge . . . your ab-

sence notwithstanding." Unless, therefore, some positive rule exists requiring service of notice of subsequent proceedings or of some particular subsequent proceedings, a respondent who fails to appear is not entitled to further notice.

But before proceeding to trial the Court must see that the proceedings have been regularly taken, and I can find no rule or authority which would enable me to overlook or repair nunc pro tunc the petitioner's failure to comply with a positive statutory requirement laid down as a necessary preliminary to the due issue of a citation. As has been often emphasised, this Court, in matrimonial causes, must have a care for the interests of society, as well as of the immediate parties, and one of the large outstanding evils to be dreaded is that the Court's power to decree a separation between dissatisfied spouses should be collusively invoked when, perchance, there exists no legal ground therefor. Hence the necessity for the petitioner's oath at the outset; a guaranty, as it were, that the Court's aid is sought in good faith. In this connection I may point out that the Divorce Rules contain no provision such as is to be found in Order 70, Rule 1 (M. R. 1037), of the Supreme Court Rules, even if such a rule of practice could avail to cure the non-compliance with a statutory provision. This consideration distinguishes this case from McLagan v. McLagan, 11 B. C. R. 325.

I notice that the citation with certificate and affidavit of service has not been filed, as required by Rule 13. The reason for this Rule is pointed out in Cook v. Cook, 28 L. J. P. 37, viz., "to preserve evidence that the proper steps have been taken." Our Rule differs from the English Rule from which it was taken, the words "by the party effecting it" being added; why, I do not know, unless it be that at the time our Rules were first promulgated service of the Court's process was always effected through officers of the Court, who would naturally make their return to the Court's registry.

In the result, I can give no directions. The petitioner will have to begin de novo.

ALBERTA.

TAYLOR, DIST. CT.J. AUGUST 11TH, 1909.

DISTRICT COURT OF EDMONTON.

WORSLEY v. BRUNTON.

Principal and Agent—Payment Made to Agent for Specific Purpose — Misapplication — Negligence — Liability of Gratuitous Agent—Work of Skill.

Action for the return of money paid by the plaintiff to the defendant, in the circumstances mentioned below.

R. D. Tighe, for the plaintiff.

A. F. Ewing, for the defendant.

TAYLOR, DIST. CT. J.:—The plaintiff is administrator of the estate of Pennyman J. Worsley, deceased.

The estate was the assignee of a certain lot on which certain payments were due to the Hudson Bay Company. This lot had been purchased by one McLean from the Hudson Bay Company. McLean had sold to one McLaughlin. McLaughlin had sold to Harrison and Blair, and these latter had sold to the deceased, giving an assignment of their agreement with McLaughlin. This latter assignment is dated the 6th February, 1906.

On the 12th February, however, a new assignment is made by McLean direct to the deceased, having for its consideration $1. This is filed as exhibit 1. In this the assignor covenants that the only amount due is the sum of $183.33, with interest at 7 per cent. from the 2nd December, 1905. This is to be paid to the Hudson Bay Company. This assignment, being of later date, would seem to cancel all the prior assignments.

The plaintiff gave to the defendant this assignment (exhibit 1) with other papers, as he was leaving the city for a time, with instructions to make payments which fell due, and among the same was the one under the assignment exhibit 1. Nothing was said about any remuneration to be paid by the plaintiff to the defendant. The defendant in his evidence states that he intended the same to be gratuitous. He was,

however, if he got an opportunity, to sell the lot, and, being a real estate agent, would then presumably be entitled to a commission for making the sale.

The defendant made a certain payment of $102 on account of the lot, which the plaintiff repaid. Instead, however, of making the payment to the Hudson Bay Company, as called for in the assignment, he made it to Harrison, one of the assignors in the assignment dated the 6th February. He states that he made the payment to him as the solicitor of the plaintiff. There is no evidence to support this, other than the fact that the defendant says he knew Harrison was the solicitor who acted for the plaintiff in obtaining letters of administration. As Harrison was one of the persons from whom the deceased purchased, and as the defendant put through that sale, I am clearly of the opinion that the defendant paid to Harrison not as the solicitor of the estate, but because he knew that the deceased had purchased from Harrison, and he, no doubt, thought that Harrison would be the person to whom payment should have been made. This seems to me a fair inference to draw from the defendant's evidence. There is also the fact that, so far as the evidence goes, he gave Harrison no instructions in the matter. Harrison sent the money to McLaughlin, and McLaughlin returned the same, stating that he had no interest in the money. Harrison next sent the money to McLean, who accepted the same, but never remitted to the Hudson Bay Company. The plaintiff now sues for the return of this amount.

There is no evidence to shew that McLean was the agent of the Hudson Bay Company, nor that he had any interest in the lot; in fact exhibit 1 goes to shew that he had none whatever. The defendant in his evidence stated that he never looked into the papers given him. To use his own words, "I never examined the agreements other than reading the indorsements." Had he done so, it seems to me that he could have made no mistake. Is this negligence which will make the defendant liable?

Beven on Negligence, Can. ed., p. 766, says: "Of course if a man undertakes to perform a work in such circumstances that a representation of capacity is involved, he must act up to his representation or pay for the damages he causes."

The defendant was a real estate agent. We must presume that he knew what an agreement for sale and an absolute assignment thereof were. He, in the usual course of

business, might be called upon to perform just such acts as he undertook here, although he stated in his evidence that he had never acted in this capacity before; but to me what he should have done seems so plain that, even were he not a real estate agent, but a man having no experience in such matters, he should have known that he had only to look into the document in his possession to find out to whom the money was payable.

Again, in Bowstead on Agency, 3rd ed., p. 164: "A gratuitous agent is liable for gross negligence in the course of the agency; but not for mere want of skill, unless he is in a situation from which skill may be implied."

Is it not reasonable to expect a real estate agent to have sufficient skill in his business to know to whom a payment is made, from perusing a document like exhibit 1? The defendant does not deny that he had the skill, but says he never read over exhibit 1.

There seems to me no doubt in this matter but that the defendant displayed gross negligence in this payment, and I will so find.

There will be judgment for the plaintiff.

There was an application for joining Harrison as a third party, and he was so joined, but at the trial the question of his liability was not raised, this being left over by the consent of all parties awaiting judgment on the issue between the plaintiff and defendant. I will stay any further proceedings until the defendant has an opportunity to make application to proceed against the third party.

ALBERTA.

STUART, J. NOVEMBER 10TH, 1909.

TRIAL.

SMITHNESEKI v. WILTSIE.

Vendor and Purchaser—Contract for Sale of Land—Abandonment by Purchaser—Cancellation by Vendor—Action by Purchaser for Return of Moneys Paid.

Action to recover $1,550 and interest and $54 for damages.

By the plaintiff's statement of claim he alleged that by an agreement in writing, dated the 16th May, 1907, the defendant agreed to sell to the plaintiff certain lands described, for $3,100, payable as follows: $1,550 upon the execution of the agreement; $775 on the 16th November, 1907; and $775 on the 16th May, 1908; that the first $1,550 was paid to the defendant on the 16th May, 1907; that the defendant by the agreement promised that, upon payment of the $3,100 as aforesaid, she would convey the lands to the plaintiff; that the plaintiff was ready and willing to perform the agreement on his part, and had made a demand on the defendant to perform the agreement on her part, but that she refused to do so, and had wrongfully and unlawfully cancelled the agreement; that the plaintiff in February, 1909, tendered to the defendant the balance due under the agreement, but she refused to accept the same, and refused to repay the moneys previously paid by the plaintiff; that the plaintiff, since the execution of the agreement, had caused the lands to be subdivided at a cost of $50, and had paid for registration of the plan of subdivision $4, and the defendant had taken the benefit of the subdivision and registration. The plaintiff, therefore, claimed a return of the $1,550 and payment of the $54 as special damage.

The statement of defence was as follows: —

1. The plaintiff abandoned his said agreement and refused to carry out the same, and the defendant accepted such abandonment, and the said agreement was cancelled and rescinded.

2. It was agreed in and by the said agreement that if the purchaser failed to make the payments therein mentioned, the vendor should have the right to declare the agreement null and void, by written notice to that effect addressed to the purchaser at Edmonton, and that thereupon all rights or interest created or existing in favour of the purchaser should cease and determine, and the premises sold should revert and revest in the vendor, without any other act or legal proceeding taken, and without any right on the part of the purchaser to any claim for compensation for moneys paid thereon.

3. The plaintiff did make default in the payment of both the instalments due under the said agreement, on the 16th November, 1907, and the 16th May, 1908, and the vendor

gave notice as required by the said agreement, and the right of the purchaser ceased and determined.

4. The plaintiff registered a caveat against the said lands, and by originating summons issued on or about the 1st June, 1908, the defendant applied for an order discharging the said caveat.

5. The matter of the said originating summons was determined before Mr. Justice Harvey, on the 19th June, 1908, and it was directed that such caveat should be discharged unless, within 30 days from that date, proceedings should be taken in Court to substantiate the title, estate, interest, or lien claimed thereby, and certificate of the commencement of such proceedings should be registered in the land titles office.

6. No such proceedings were commenced, and no such certificate filed. and the order of Mr. Justice Harvey was registered in the land titles office on the 8th August, 1908, and such caveat was discharged.

7. Certain further caveats were registered by purchasers from the plaintiff, and upon originating summons taken out on the 20th October, 1908, Mr. Justice Scott, on the 13th November, 1908, made an order for the discharge of such caveats, 11 in all, after the expiration of 10 days from the service of the said order, unless proceedings were taken to sustain such caveats.

8. No such proceedings were taken, and such order was duly registered in the land titles office for the North Alberta land registration district, and such caveats discharged.

9. The lands in question had fallen in value to such an extent that they were not worth an amount in excess of the amount remaining due upon them, and the plaintiff was wholly unable to make any sale of the property at an amount in excess of the amount so remaining due, or make any disposition of his property, and was compelled to abandon the performance of his said contract.

10. Upon such abandonment. the defendant determined the said contract, and the plaintiff has no further interest therein.

11. No cancellation made by the defendant was wrongful or unlawful.

12. The plaintiff at no time tendered to the defendant the balance due under the said agreement for sale, and was never ready or willing to complete the same.

13. The plaintiff did not cause the said lands to be subdivided at an expense at $50, or any other sum, and the defendant has not taken advantage of any such subdivision.

The plaintiff joined issue on the statement of defence.

The action was tried before STUART, J., without a jury.

J. Cormack, for the plaintiff.

O. M. Biggar, for the defendant.

STUART, J.:—I am bound to say that there are no merits whatever in the plaintiff's case, as far as I can see. The order of Mr. Justice Harvey, it seems to me, practically means this: the plaintiff was in default when the order was made, over a month, in respect of the last payment, over a year in respect of the second deferred payment, and he had filed a caveat some time before the last payment became due in April, I think, and the order was made on the 19th June, stating that unless he proceeded to substantiate the claim he had against that land within 30 days from that date, the caveat would be removed and discharged. The practical effect of it seems to me to be this: he was given 30 days to substantiate his right under that agreement, which was the basis of his caveat; he did not do it. He could then have paid up his money before that time and sued for specific performance, or tendered his money, or, if he was not able to pay the money, it is possible—I am not expressing an opinion, but it is possible—that he might have said, "I cannot pay the money, but I want to come into Court and have the property sold." It is possible that he might have done that. But he did nothing whatever during that month, and the order of Mr. Justice Harvy was not registered for 3 weeks afterwards, until the 8th August; so he had practically 7 weeks before the caveat was discharged, and he did nothing, neither tendered the money nor paid it, nor took any proceedings of any kind to establish his rights under his contract.

Now, I am of opinion that that constitutes an abandonment of the contract by him. I think that things have gone just a little too far in favour of purchasers. What in the world is a vendor to do? Is he to wait forever and ever when a purchaser will not pay him? In this case particularly there are no merits in the plaintiff, because, if we are going to treat the vendor as a trustee for the purchaser, surely the purchaser, when he goes on and sells a whole

lot of property, the property in dispute, and has $1,900 of the purchase money for the property in his pocket, is a trustee for the vendor to the extent of that money. And what did this purchaser do? He did not pay the vendor that money nor any part of it. It was more than sufficient to pay up the purchase price in full. He diverted to other uses the very proceeds of the property which he had agreed to buy from the vendor. and which he had partly resold, which surely should have been applied to the payment of the unpaid purchase money, which he used for his own purpose. In those circumstances, surely he has no meritorious position in this Court. It is just another example of the pernicious effects of selling property which you have no title to, which has been carried on continuously.

I think that contract came to an end, that the plaintiff abandoned it. He must be taken to have abandoned it, and I do not think what happened in February constituted a recognition of its existence by the defendant either. I cannot decide what did happen really. His account was extremely obscure, and differs from hers. She says some two men came there, and she does not know who they were, and he says he was running around with a man whom he does not know. The matter is altogether too obscure to base a recognition by her upon it that the contract for the property was still in existence.

For these reasons I will dismiss the action, with costs.

ALBERTA.

TAYLOR, DIST. CT.J. DECEMBER 4TH. 1909

DISTRICT COURT OF EDMONTON.

RE MURRAY AND FOLEY.

Master and Servant — Injury to Servant — Employment by Contractors for Construction of Dominion Railway — Workmen's Compensation Act of Alberta—Application—Public Works Health Act (Dominion)—Conflict.

Application by Allen Murray under the Workmen's Compensation Act of Alberta for compensation from his employers, Foley, Welsh & Stewart, railway contractors.

The applicant was a bridge carpenter, and on the 25th February 1909, sustained an injury from an accident arising in the course of his employment. The accident happened upon a trestle bridge 59 miles west of Edmonton on the Grand Trunk Pacific construction works. The applicant was engaged in laying timber upon the bridge by means of cable operated by a steam engine, and was knocked off the bridge by some moving timbers. The nature of the injury was dislocation of one of the bones of the foot. He was confined to the camp for 3 weeks following the accident, and was then removed to the Pembina hospital for treatment, and remained there until the 6th April. He was then discharged from the hospital, but up to the time of the hearing had been unable to perform any labour. He claimed compensation at the rate of $9 a week from the date of the accident.

The respondents denied their liability to pay compensation under the Act, and contended that, as contractors for the construction of the Grand Trunk Pacific Railway, they were subject to the exclusive legislative authority of the Parliament of Canada; that, in pursuance of such legislative authority, the Parliament of Canada had made applicable to such work the provisions of the Public Works Health Act, R. S. C. 1906 ch. 135, and the applicant came under the provisions of that Act, and received medical attendance in pursuance of its regulations; and that the Workmen's Compensation Act did not apply.

J. R. Boyle, for the applicant.

O. M. Biggar, for the respondents.

TAYLOR, DIST. CT.J.:—In this matter I am of the opinion that the Workmen's Compensation Act applies.

The Public Works Health Act does not in any way cover compensation for injury that may be incurred to any workmen. It is for the purpose of compelling certain contractors or companies engaged in public works to properly care for the health of the workmen and make the camps sanitary. It is also for the purpose of compelling them to have within reasonable distance of the workmen proper medical men and hospital accommodation to care for any of the workmen who may become sick or injured, as it is well known that most of these works are carried on at long distances from places where medical care or accommodation for the sick or injured is to be had.

The health regulations permit contractors or companies to levy a certain contribution from every workman to meet the expenses incurred. This, no doubt, in many cases reimburses the company for their outlay.

Now the Workmen's Compensation Act is for a different purpose. It is to reimburse the workman to a certain extent for his loss of time if he should suffer an injury which incapacitates him from work. He might even not be confined to hospital or require doctor's care, yet be unable to work.

While in some cases the two Acts may overlap, I do not see that they in any way conflict. In my opinion, therefore, the Workmen's Compensation Act is not ultra vires, and does apply to such construction works as that in which the claimant was engaged.

ALBERTA.

DECEMBER 21ST, 1909.

FULL COURT.

UNION BANK OF CANADA v. CROSS AND EVERARD.

Promissory Note — Signature of Company, Followed by Signatures of Directors—Personal Liability of Directors—Intention—Intrinsic and Extrinsic Evidence.

Appeal by the plaintiffs from the judgment of SCOTT, J., dismissing an action upon a promissory note.

W. L. Walsh, K.C., for the plaintiffs.

W. A. Begg, for the defendants.

The judgment of the Court (SIFTON, C.J., HARVEY, STUART, and BECK, JJ.), was delivered by

HARVEY, J.:—This is an action on a promissory note in the following terms:—

$1,000.00 Medicine Hat, Aug. 17, 1907.

Two months after date we promise to pay to the order of and at the Union Bank of Canada, Medicine Hat, the sum of one thousand . . . xx-100 dollars with interest

at the rate of 8 per cent. per annum until due and 8 per cent. per annum after due until paid. Value received.

The Alberta Brick Co. Ltd.,
W. C. Harris, Dir.
Wm. M. Cross, Mgr.
F. C. Everard.

The defence is that the note is a note of the company only, and not of the individuals who signed it or any of them, and my brother Scott, who tried the action, gave effect to this defence, and gave judgment in favour of the defendants. The question is, of course, one of the intention of the parties to the note, and we are confronted at the very threshold with the question whether that intention must be gathered from the document itself, or whether, on the other hand, we may look at extrinsic evidence to determine it.

In a very similar case decided this year in England, Chapman v. Smethurst, 78 L. J. K. B. 654, this point was considered by some of the Judges. The note in that case was as follows:—

Six months after demand I promise to pay to Mr. M. Chapman the sum of £300 for value received together with six per cent. interest per annum.

J. H. Smethurst's Laundry & Dye Works Limited,
J. H. Smethurst, managing director.

Mr. Justice Channell, who tried the case, held that the defendant was personally liable. The Court of Appeal reversed this decision, and declared the note to be the note of the company only. Kennedy, L.J., at p. 657, says: "I entirely agree with the observation of Mr. Justice Channell that the question is whether the promise to pay the money was a personal promise of the defendant or whether it was a promise of the company of which he was the managing director. That depends upon the intention of the parties, which intention, I think, must be gathered from the terms of the document alone." The other Judges say nothing on this point, but their conclusion is based on a consideration of the terms of the document alone.

On the other hand, in our own Court, in Fairchild v. Ferguson, 21 S. C. R. 484, a contrary view is expressed. The note there was in the following form:—

Sixty days after date we promise to pay to Dolan & Barr or order. . . . Value received.

W. D. Robinson,
Manager, Otto Tail Lumber Co.

The editor's head-note is: "Held, affirming the decision of the Court below, that, as the evidence established that both R. and the payees of the note intended to make the company liable, and as R. had authority as manager to make a note on which the company would be liable, and as the form of the note was sufficient to effect that purpose, the defence could not prevail, and the holders of the note were entitled to recover." At pp. 487-8 Mr. Justice Gwynne says: "Nor can there be any doubt that evidence of all the circumstances surrounding the making of an instrument as to the intent with which, and the consideration for which, it was executed, is admissible for the purpose of shewing who was or were the party or parties bound by it, if there be anything on the face of the instrument which creates any ambiguity in the matter." Mr. Justice Patterson, whose judgment is concurred in by two of the other Judges, says nothing on this point, but for the purpose of reaching his conclusion he refers to all the facts of the case as brought out in evidence, thus indicating his concurrence with the view of Mr .Justice Gwynne.

The general rule of law is that a patent ambiguity may not be explained by extrinsic evidence, but a latent ambiguity may. I find it a little difficult to see any distinction in principle between the cases mentioned, for there seems as much ambiguity in one case as in the other, and it appears to be of the same character. Without forming any conclusion on this point, I purpose first considering the case without reference to the evidence, in the light of the authorities.

A great many cases were referred to in the argument, many of which are considered in the cases I have already referred to. Unfortunately none of these cases is directly in point, because in all of them the question was whether the liability was that of the company *or* of the individuals signing the note. In the present case there is no doubt of the liability of the company, and the question is whether the company *and* the persons signing are liable.

In Healey v. Story, 18 L. J. Ex. 8, the note was in the following terms:—

London, March 19, 1847.

On demand we jointly and severally promise to pay to Mr. Edward Healey or order the sum of £250. Value received.

For and on behalf of the Wesleyan Newspaper Association.

Parker Story, } Directors.
James Ware, }

The court held that the words jointly and severally indicated a personal liability.

In Lindus v. Melrose, 27 L. J. Ex. 326, the note was as follows:—

London, December 31st, 1856.

Three months after date we jointly promise to pay Mr. F. Shaw or order £600 for value received in stock, on account of the London and Birmingham Iron and Hardware Company Limited. Payable at the London Joint-Stock Bank Princess Street, Mansion House.

James Melrose, }
H. W. Wood, } Directors.
John Harris, }
Edwin Guest, Secretary.

The Court in this case heeld that the words in the note "on account of the company" indicated that the note was given for the company, and that the persons signing signed as officers of the company, and not as individuals, and consequently held that it was a note of the company. In the final judgment in the Exchequer Chamber, delivered by Coleridge, J., at p. 329, he says: "My brothers Crompton and Willis entertain considerable doubt upon the construction of the instrument, not, however, sufficiently strong to induce them to dissent from the judgment of the Court; although they are anxious to guard against its being supposed that in the judgment we pronounce we intend to throw any doubt upon the rule that an agent putting his name to a mercantile instrument is liable as a principal unless the instrument distinctly shews that he signs as agent..... In these remarks of my brothers we entirely concur."

In Bottomley v. Fisher, 31 L. J. Ex. 417, the note was as follows:—

Midland Counties Building Society, No. 3, Birmingham, 1st September, 1856. One month after demand we jointly and severally promise to pay Mr. John Bottomley the sum of one hundred and twenty pounds, with interest thereon after the rate of six pounds per cent. per annum (payable half-yearly) for value received.

W. R. Heath, }
S. B. Smith, } Directors.
W. D. Fisher, Secretary.

The evidence shewed that the note was given for a debt of the society, of which the defendant was secretary, and his contention was that he signed simply as such secretary for the society. The Court held that the defendant was personally liable.

In Gray v. Raper, L. R. 1 C. P. 694, the note was:—

May 8th. 1861. Twelve months after date we the undersigned, being members of the Executive Committee, on behalf of the London and South Western Railway Co-operative Society, do jointly promise to pay to Mr. William Gray or order the sum of one hundred pounds. Value received.

The note was given for work done for the society, and was signed by the seven defendants and witnessed by the society's secretary. The Court unanimously held that the defendants were liable on the note.

In Courtland v. Saunders, 16 L. T. N. S. 562, the note was in the following words:—

London, 28th July, 1866. Three months after date we promise to pay the English Joint Stock Bank (Limited) or order the sum of £1,000. Value received.

Hugh Ward Saunders, }
W. Watson, } Directors of the Financial Insurance Company (Limited).
R. J. Blunt, }
W. W. Prole, }

At the National Provincial Bank of Glasgow, England.
Charles C. Green, Manager.

It was held that the defendants were personally liable. Bovill, C.J., points out the distinction from Lindus v. Melrose, in that in that case the note was stated to be "on account of the company," and the identity in principle with Gray v. Raper, Willis, J., says: "The rule is clear that a person signing a note, in order not to be liable on the ground of his

being an agent, must say so on the face of the note. This was assented to by all the Judges in Lindus v. Melrose. My brothers Crompton and Channell doubted with me as to the words "on account of" being equivalent to "on behalf of," but the defendants were held to be exempt on the ground that they signed per procuration of the company."

In Dutton v. Marsh, L. R. 6 Q. B. 361, the note was as follows:—

Isle of Man, 7th January 1864. We the directors of the Isle of Man Slate and Flag Company Limited do promise to pay John Dutton, Esq., the sum of £1,600 sterling with interest at the rate of 6 per cent. per annum until paid. For value received.

Witnessed by
(L.S.)
Leslie Lockhart

Richard J. Marsh, Chairman.
Joseph Higgins,
Samuel Broadbent,
Henry Johnson.

The company's seal was affixed, as indicated by the letters "L.S.," and the note was given for an indebtedness of the company. The directors were held to be personally liable. Cockburn, C.J., who delivered the judgment of the Court, at p. 364 says: "The effect of the authorities is clearly this, that where parties, in making a promissory note or accepting a bill, describe themselves as directors, or by any similar form of description, but do not state on the face of the document that it is on account or on behalf of those whom they might otherwise be considered as representing—if they merely describe themselves as directors, but do not state that they are acting on behalf of the company—they are individually liable. But, on the other hand, if they state that they are signing the note or the acceptance on account of or on behalf of some company or body of whom they are the directors and the representatives, in that case, as the case of Lindus v. Melrose fully establishes, they do not make themselves liable when they sign their names, but are taken to have been acting for the company, as the statement on the face of the document represented." He goes on to shew that the affixing of the company's seal cannot be taken as an indication that the directors signed on behalf of the company, and at p. 365 says: "There is no case that goes the length

of saying that the affixing of the seal, where the parties do not otherwise use terms to exclude their personal liability. would have that effect. We think it is going too far to say that the mere affixing of the seal has that effect."

The cases I have cited and the quotations I have given serve sufficiently to illustrate the principles on which liability is created or avoided. The last case of Dutton v. Marsh more nearly approaches the one at bar than any other. Here we have the signature of the company; there they had the seal. There the persons signing were described in the body of the note as directors; while here the description is only the abbreviation "Dir," which does not appear after the name of one of the defendants at all, though the evidence shews that he was in fact a director. The distinction there made between that case and Lindus v. Melrose applies with full force to this case, and on the principle laid down in the extracts which I have taken from the judgments, there is no doubt in my mind that there is nothing on the face of the note to indicate that the defendants were not to be personally liable. There is the fact in this case beyond the facts in any of the cited cases that there is no valid reason which can be given for their signatures except the intention to incur personal liability, for the company's liability is incurred by the placing of its name by one who had authority.

Then, if we consider the evidence, what do we find. We find that this note is a renewal of a former note for a like amount, beginning, "Three months after date we jointly and severally promise to pay," and signed "The Alberta Brick Co., Ltd., per W. C. Harris, Pres. Treas., W. M. Cross, Mgr. Dir., James Gavin, Dir., F. D. Everard, Dir."

The evidence shews that the abbreviation "Dir." was placed on the note after the signatures, and it appears to be in the handwriting of Harris. The evidence shews that before making the advance the manager of the bank required the note of the company secured by the directors personally. Mr. Harris, the president and treasurer, apparently conducted most of the financial business, but he was not a witness at the trial. Both defendants state that they signed the note for the purpose of giving it validity as a note of the company, but not with the intention of incurring any personal liability. In the face of the facts that these are apparently business men, that the terms of the first note are

"jointly and severally," that they admit another transaction in which they did incur personal liability in a note for the company, I should hesitate to accept such a statement; but, in view of the fact that the plaintiffs' manager knew nothing of this, and made the advance on their personal security, it would seem to be immaterial. Such a defence was unsuccessfully attempted in Courtland v. Saunders, above mentioned, where it was held that, there being no mutual mistake, there was no equity in the defendants' favour.

None of the other facts brought out in evidence appears to me to affect the question, and the liability of the defendants seems more clearly established, if possible, by the extrinsic evidence than by the note itself. In Lindus v. Melrose, on which the learned trial Judge based his judgment, it was stated that if the promise had been joint and several, it would have been hard to resist the conclusion that the defendants were personally liable. There is no doubt that, if it were necessary, by amendment, the first note could be made the basis of this action, and the plaintiffs would in that case, on the authority of Lindus v. Melrose, which is probably the strongest authority in the defendants' favour, be entitled to succeed. The only difference would be a few dollars of interest, since only the legal rate of interest could be collected on the first note. For the reasons I have mentioned, however, this is unnecessary, as, in my opinion, on the note itself and in the facts as disclosed by the evidence, the defendants are liable. The appeal should be allowed, the judgment in favour of the defendants set aside, and judgment entered in the Court below for the plaintiffs for the amount of the note sued on with costs.

ALBERTA.

BECK, J. DECEMBER 21ST, 1909.

TRIAL.

ROYAL TRUST CO. v. BELL.

Landlord and Tenant—Lease—Breach of Covenants—Subletting without Leave—Alteration of Premises without Consent of Lessor — Forfeiture—Relief against—Terms — Costs.

Action by the company, as executors of the will of James Reilly, deceased, for a declaration that the plaintiffs were

entitled to the possession of certain leasehold premises, the Royal Hotel in the city of Calgary.

R. B. Bennett, K.C., and C. B. Reilly, for the plaintiffs.

T. M. Tweedie, for the defendants.

BECK, J.:—The lease is dated the 15th September, 1905. The deceased James Reilly is the lessor. The lessees named in the lease are Celestin Thibault and Alfred Moodie. On the 17th April, 1906, Moodie assigned his interest to Thibault. Subsequently Thibault assigned to Bell and Schiesel (the defendants), who took possession on the 3rd November, 1908. A note of the consent of the lessor to this assignment is indorsed on the lease under date 10th March, 1909.

The lease contains covenants on the part of the lessees (which it is declared shall enure to the benefit of and be binding upon the executors, administrators, and assigns of the respective parties: (1) that they will not nor will either of them "sell assign or let or otherwise part with the present lease or the said premises hereby demised or any part thereof to any person or persons whomsoever for the whole or any part of the said term without the consent in writing" of the lessor, and the said consent shall not be unreasonably and arbitrarily withheld in respect of a responsible and desirable proposed tenant; (2) that the lessees shall not "alter change or remove any part of the said premises yards or offices externally or internally without the license or consent in writing" of the lessor from time to time first had and obtained. It is on the ground of alleged breaches of these two covenants that the plaintiffs base their action, there being a proviso in the lease that it is upon the express condition that if a breach or default shall be made in any of the covenants of the lessees, then "it shall be lawful for the lessor into and upon the premises or any of part thereof in the name of the whole to re-enter and the same to have again repossess and enjoy as if this memorandum of lease had never been executed."

The lessor died on the 9th July, 1909. Letters probate of his will were granted to the plaintiffs on the 4th August, 1909.

I deal first with the alleged breaches of the covenant not to assign or sublet without leave.

When Bell and Schiesel became tenants, i.e., on the 3rd November, 1908, several portions of the premises were held

by subtenants, viz.: (1) the barber-shop, situated between the rotunda and the bar, by Edmunds and Bishop; (2) the cigar-stand, situated in the rotunda, by Robert Emmett; (3) a store facing on Centre street (i.e., West), by the Imperial Land Company; (4) a store facing on Centre street, by the New Method Employment Agency (Herbert Strong); (5) a store facing on Centre street, by one Scott as a book agent, (6) a store facing on Centre street, by the Okotoks Land Company (Campbell & McKay); (7) the stable, by the City Cartage Company; (8) the "Hole-in-the-Wall" under the stairway, by W. J. Shaw, for a messenger service and sale of post-cards, &c.

I have put the state of things as they were when the present tenants took possession, i.e., the 3rd November, 1908; but I think they are entitled to have the questions involved determined by reference to the date upon which the lessor, Mr. Reilly, signified formally his consent in writing to the assignment to them of the lease, namely, the 10th March, 1909.

Mr. Reilly, the lessor, kept a room in the hotel continuously as a guest, and usually took his meals in the hotel. During the present tenants' time, the evidence shews, he was absent during a period of about two months.

The rent, which was payable monthly in advance, was paid regularly, by the tenants depositing the amount on or about the first of each month in the Union Bank of Canada to Mr. Reilly's credit. These payments were regularly made until and including that for the 1st September, 1909. On the tenants tendering the payment of the rent payable in advance on the 1st October, the bank refused it on the plaintiffs' instructions.

This action was commenced on the 30th September.

With regard to (1) the barber-shop; there seems to have been no change in the subtenancy after Bell & Schiesel took possession of the hotel.

With regard to (2) the cigar-stand; there was a change of subtenants, but it was by way of assignment by the subtenant who was in occupation when Bell & Schiesel took possession of the hotel.

In Foa's Landlord and Tenant, 4th ed., p. 270, this is said: "Where a covenant on the part of the lessee, his executors, administrators, and assigns, not to assign or underlet without the lessor's consent, with a proviso for re-entry on

its breach, is contained in a lease, and the lessor gives his consent to an underlease, the underlessee is not, as between himself and the head-lessor, bound by it, because the covenant, by its terms, is not broken by a further assignment or underlease by him." In a note to this passage it is said: "If the lessor desires to exercise a control over future dealings with the property, he can in general only do so by making his license for the underlease expressly conditional on the insertion therein of provisions restricting the underlessee from assigning, &c., without his consent, and requiring the lessee to bind himself to enforce the restriction; 3 Blyth. & Jarm. Conv., 4th ed., p. 630; or he may make it a condition of the license that he should himself be a party to the underlease, and that the undertenant should not assign or underlet without his consent. See In re Spark, [1905] 1 Ch. 456."

With regard to (3) the store occupied by the Imperial Land Company; these subtenants were in occupation, as I have stated, when Bell & Schiesel took possession of the hotel. They were then tenants from month to month, at a rental of $75. Bell & Schiesel "raised the rent" to $100 a month. This was done during Mr. Reilly's lifetime, but there is nothing to shew that he became aware of it. I think this did not amount to a new subletting.

In Woodfall on Landlord and Tenant, 18th ed., p. 254, it is said: "If, whilst a tenant from year to year is in possession of lands under an agreement reserving a certain rent, he agrees with his landlord to pay an increased or reduced rent, this will not then have the effect of creating a new tenancy."

With regard to (4) the store in occupation by the New Method Employment Agency. There was no change in the tenants, but the rent was raised from $50 to $75 a month. This case is, therefore, like item (3).

With regard to (5) the store occupied by Scott as a book agent. Scott vacated the premises, and one Preston became tenant in December, 1908. Bell states that Mr. Reilly was aware of the fact that Preston was the subtenant, and it is hardly possible to suppose otherwise. As I have pointed out, Mr. Reilly's written consent to the assignment to Bell & Schiesel of the head-lease was made long after Preston became subtenant. Preston went in as a subtenant from month to month, at $75 a month. Bell then proposed to "raise the

rent" to $100 a month. Preston then asked for a formal lease for a definite time; Bell & Schiesel accordingly gave him a lease under seal for two years from the 1st September, 1909, at $100 a month except for the months of February, March, and April, for each of which the rent was fixed at $80. This new lease was given on the 4th August, 1909, the same day as that on which letters probate were granted to the plaintiffs.

As far as I can see, the defendants have no answer to the plaintiffs' contention that this resulted in a forfeiture of the lease. There was no consent to the subletting; there was no waiver of the forfeiture. I think, however, I should relieve from the forfeiture arising from this act, upon terms to be imposed upon the defendants.

By an amendment to the Judicature Act made by ch. 5 of 1907, sec. 7, it is enacted that "subject to appeal as in other cases, the Court shall have power to relieve against all penalties and forfeitures, and in granting such relief to impose such terms as to costs, expenses, damages, and compensation, and all other matters, as the Court sees fit."

This provision goes much beyond the statutory provisions conferring jurisdiction upon the Courts in England. By the English statute 55 & 56 Vict. (1892) ch. 3, sec. 4, it is enacted that where a lessor is proceeding to enforce a right of reentry or forfeiture under any stipulation in the lease, the Court may, on the application of any person claiming as underlessee, make an order vesting the estate comprised in the sublease in the sublessee, "upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the Court, in the circumstances of each case, shall think fit."

I propose to adopt the idea contained in the foregoing provision, and relieve against forfeiture arising from the sublease, upon the terms that the rent payable by the defendants to the plaintiffs under the head-lease shall be increased by the amount by which the rent for this portion of the premises was increased,—this to be reckoned from the date of the sublease, and that the necessay instrument to effect this shall be executed by the defendants at their costs and harges.

With regard to (6) the store occupied by the Okotoks Land Company. As I recollect, the evidence shews that the present tenants were in occupation when Bell & Schiesel be-

came tenants. It may be that the evidence is that the sub-tenants at the time Bell & Schiesel became tenants virtually assigned their sublease to the present tenants, but, if so, what I have said with regard to (2) the cigar-stand would apply. In this case too "the rent was raised." What I have said with regard to (3) the store occupied by the Imperial Land Company meets this point.

With regard to (7), the stable, there was no change in the tenancy subsequent to Bell & Schiesel becoming tenants. With regard to (8), "The Hole-in-the-Wall," the position is the same as (7).

Then there is the special case of the dining-room. On the 10th August, 1909, Bell & Schiesel entered into an agreement with one Hazelwood, whereby they (designated as proprietors) employed Hazelwood as manager of the dining-room. The plaintiffs contend that the legal effect of this agreement is a subletting to Hazelwood.

I summarise the agreement. The proprietors appoint Hazelwood manager of the dining-room for a term of three years and one month, commencing the 10th August, 1909. For his compensation he is to retain out of the net earnings the excess over $275 per month. This latter sum is to be paid to the proprietor, in any event, monthly in advance. The manager is to conduct the dining-room in a proper manner, and to pay promptly all bills incurred for wages and supplies, and produce vouchers therefor, and indemnify the proprietor against any claims on such accounts, and is to deposit in a chartered bank to the joint credit of Bell and himself $1,000 as security for this indemnity. An inventory of the dining-room furniture, crockery, &c., is to be made, and, on the termination of the agreement for any cause whatever, the manager is to return the goods in as good condition as when received, reasonable wear and tear excepted. If any question shall arise by reason of the manager taking hold of the business in the dining-room, and the liquor license of the proprietors for the hotel shall be endangered, or, if the manager shall not conduct the business of the dining-room in an efficient and respectable manner, the manager shall, on notice, give up possession of the dining-room and everything connected therewith and shall resign the managership. In certain events the proprietors may cancel the agreement and dismiss the manager, and take over the management of the dining-room. The proprietors are to pay for light, water,

and heat of the dining-room "and covenant that in considering" (not in consideration of) "the expenses of the manager in running the business, there shall be no allowance to the proprietors for rent of the dining-room." There are provisions for compensation for fixtures and fittings if on the determination of the agreement for any cause whatever, including dismissal of the manager, the head-lessor or the proprietors took them over, otherwise the manager may remove them. It is also provided that the proprietors may sell their business at any time, and that, if the purchasers should refuse "to take over the premises subject to the terms of this agreement, the proprietors shall protect the manager to the same percentage of invoice price of fittings and fixtures, according to the year in which such sale shall take place, as is above mentioned, the manager shall not be entitled to any further or other compensation or damages or otherwise on account of termination of this agreement by such sale."

In the case of Daly v. Edwardes, 83 L. T. N. S. 548, an instrument which purported to be a lease was held, upon looking at the whole document for the purpose of ascertaining its real purpose and effect, to be not a lease, but, as Williams, L.J., expressed it, "a grant of a privilege or license masquerading as a lease." The agreement in question here has evidently been designedly drawn so as to exclude every appearance of a lease. Applying the reasoning of the learned Judges in the case cited to the present agreement, I conclude that it is not a lease. I think it a case of employer and employee, with certain privileges in favour of the latter.

I have now dealt with the alleged breaches of the covenant not to assign or sublet without leave. I come to the question of breaches of the covenant not to "alter change or remove any part of the said premises yards or offices externally or internally without the license or consent in writing of the lessor." The alterations relied upon by the plaintiffs are: (1) the change of the dining-room into a restaurant; and (2) changes in the west wall of the dining-room, namely, changing a doorway, leading from Centre street into the centre of the dining-room, into a window, and changing the window at the north-west corner of the dining-room into a doorway; putting in new window frames with plate glass in all the west windows of the dining-room, and including

one on each side of the new doorway, and enlarging one of these latter windows.

The evidence shews that several things which, no doubt, were "alterations or changes," were done in the building during Mr. Reilly's lifetime with his concurrence, but without his consent in writing; in one instance he paid half the expense incurred. It also shews that during his lifetime the tenants put in in the dining-room "private stalls," which, it was explained, were places in which two or four persons were intended to take a meal together; that he had approved of this, and had himself on occasions used them; that also during his lifetime, and with his knowledge and implicit assent, the dining-room had been conducted on the "European plan" and "run day and night" with the sign "Grill room" above the outer door—that is, as I take it, as a restaurant.

Bell states — there is nothing to contradict him, and I believe him—that Mr. Reilly had said to him that whenever he wanted to make any improvements he might go ahead if he paid for them; that they had talked several times of improvements to the dining-room; that he had said to Mr. Reilly that it would be nice to put in plate-glass in the west dining-room windows, and that it would be a good thing to change the outside entrance from the centre to near the ladies' entrance, i.e., the north-west corner, and that Mr. Reilly had approved, saying, "If you want to do it, do it."

A witness, Masser, states that Mr. Reilly told him that, if Bell wanted to put in plate-glass windows in the dining-room, he could do so if he paid for them.

Another witness, McCaffrey, states that Mr. Reilly said that Bell could make any further improvements than some then going on if he paid for them; that, if Bell paid for them, he (McCaffrey) could do anything in the way of improvements that Bell wanted. With all this by way of previous consent, it cannot be doubted that, if the alterations and changes had been undertaken in Mr. Reilly's lifetime—at all events with his knowledge—he would have been estopped from setting up the requirement of the covenant in the lease that his consent thereto must be in writing. These alterations were in fact made after his death in the month of September, approximately a month after the grant of letters probate to the plaintiffs. The rent for September had been paid in advance. That for October was refused, on the ground of forfeiture. It is a fair inference that the plaintiffs

by their agents were aware that the work was being done. and probably stood by with the view of taking advantage of the forfeiture. I am inclined to believe that the plaintiffs are estopped. It may be, too, that the rule laid down in Dumper's Case, 1 Sm. L. C. 32, the effect of which has been done away with by statute in England and Ontario, but not in this province, namely, that, once a license to assign has been given, the condition of forfeiture in default of a license is exhausted, is effective equally in a case of the condition of forfeiture for alterations made without leave; and that, therefore, a license for alterations having been given by the lessor in one instance, the condition was gone. It is clear to me that the alterations complained of are not only no detriment but an improvement to the property. Having some doubt as to the validity of the answers above indicated to the plaintiffs' claim of forfeiture for breach of the covenant now under consideration, I think I should, in view of my having already decided to relieve from forfeiture incurred on another ground, treat this also as a case of forfeiture to be relieved from, and I accordingly do so.

On the whole case, I think the judgment should declare the forfeiture of the lease for the breaches of the two covenants in the two instances mentioned, and order that the defendants be relieved from the forfeiture on fulfilling the terms I have already imposed, paying the costs of the action as between solicitor and client within one month after the service of a copy of the formal judgment.

ALBERTA.

DECEMBER 21ST, 1909.

FULL COURT.

RE CALGARY AND EDMONTON R. W. CO. AND McKINNON.

Railway—Expropriation of Land—Compensation—Value of Land Taken—Conflicting Testimony—View by Arbitrators—Award Based on Opinion of Arbitrators Set aside —Appeal—Order of Court Based on Opinions of Witnesses.

Appeal by D. H. McKinnon from an award of arbitrators fixing $2,900 as the amount of compensation to be paid for

lands of the appellant taken for the respondents' railway. The appellant sought to increase the amount.

D. H. McKinnon, appellant, in person.

J. D. Hyndman, for the respondents.

The judgment of the Court (SIFTON, C.J., HARVEY, STUART, and BECK, JJ.), was delivered by

HARVEY, J.:—The respondents in extending their line of railway required certain lands belonging to the appellant in the city of Strathcona. The price offered not being satisfactory, an arbitration was held under the provisions of the Railway Act. Two of the arbitrators, constituting a majority, awarded the appellant the sum of $2,900, the third arbitrator being of opinion that the amount should be $4,700.

This is an appeal from the award. During the course of the arbitration the arbitrators made a personal inspection of the land, and in the award the following statement appears: "We regret very much that the evidence submitted consisted so largely of personal opinion of values, and produced so little of authentic fact in confirmation. The expert evidence submitted varied so widely in difference of opinion as to land values, that we have not found it a valuable factor in assisting our conclusions, and we have been thrown very considerably upon our own judgment in arriving at this decision. Reasoning from our own judgment and a few actual facts submitted in evidence, we are convinced that the sum of $2,900 is a fair and just valuation of the land under dispute."

No objection is taken to the inspection made by the arbitrators, which is authorised by sec. 201 of the Act; but it is contended that the arbitrators may not substitute that for the other evidence and base their conclusion on it.

It seems quite clear that, although the arbitrators use the term "judgment," they use it in the sense of opinion, and that they have reached their conclusion from their own opinions of the value and not those of the witnesses.

Both in principle and on authority this appears to be improper. Section 209, which authorises this appeal, provides that "upon the hearing of the appeal such Court (of appeal) shall decide any question of fact upon the evidence taken before the arbitrators as in a case of original jurisdiction."

Now it is quite apparent that this Court cannot take into consideration the opinions of the arbitrators, which were not

given in evidence. Its duty is to say whether the judgment of the arbitrators was correct, and it can only do that by reference to the evidence in the record. It must follow then that the arbitrators also must decide on the evidence which is in the record, and not on something which is known only to themselves. If private opinions of the arbitrators could take the place of evidence, the parties would be placed at great disadvantage, not being able to question and ascertain the ground for the opinions, and to meet them by proper evidence. The authority to inspect any property in question given by sec. 201 is in much the same terms as that given to a Judge or jury by the Rules of Court (659 and 660), and in London General Omnibus Co. v. Lasell, [1900] 1 Ch. 135, it was held that such a view could not take the place of evidence. At p. 139 Lord Alverstone, C.J., says: "I have never heard it said, and speaking for myself I should be very sorry to indorse the idea, that the Judge is entitled to put a view instead of evidence; a view, as I have always understood, is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence."

The award, therefore, having been made on what was not properly evidence, it must be set aside, and the duty of this Court then, under the terms of sec. 209, is to make the award on the evidence which was taken before the arbitrators.

The land in question consists of two lots, 56 feet and 33 feet in width, of which a small triangular portion of one, not being included in the right of way, is not required by the railway company. The value of this small portion is variously estimated by the witnesses from nothing to $300 or $400; but all are of the opinion that, standing by itself and adjoining the railway, it is of comparatively small value. The respondents' witnesses are the agent of the Calgary and Edmonton Townsite Company, another person who valued the lots with him for the purpose of fixing a value, and the city assessor. The two former naturally agree as to the value, which is placed at about $2,400 though the first admits that his company are asking $2,500 a lot for lots one block away from the lots in question, which are only 33 feet wide. He says, however, that they are not getting it, and also that a better view is to be obtained from them. The assessor puts the value at $2,500 and $35 for the portion not taken. There are 5 witnesses for the appellant, all of whom say the lots

have a special value for residential purposes by reason of their proximity to the top of the river bank, and they place the valuation at sums ranging from $5,000 to $7,000. They are apparently all disinterested, and several of them are or have been engaged in selling real estate, and the prices they name they give as, in their opinion, the fair market value of the lots, some of them expressing their willingness to buy at the valuation given. The lots had not been offered for sale, as the owner stated that he had intended to use them for a residential site for himself. There is no evidence of sales of similarly situated lots, which is generally the most useful evidence for the purpose of ascertaining the market value, which of course is what must be given in a case of expropriation. The dissenting arbitrator would have placed the value at $5,000, because, as he states, 3 of the witnesses swore that they would pay that sum, and would have awarded $4,700, deducting $300 for the small portion not taken. There would appear to be much force in his view, though some allowance perhaps should be made for the natural tendency of the ordinary person to be more ready to pay for what he knows he cannot get than for what he can get. The amount of $300, however, which he places as the value of the remaining portion, seems rather large in view of the evidence. Taking into consideration the reasons he calls attention to and what has just been mentioned, and the fact that the Calgary and Edmonton Townsite trustees had placed a valuation of $5,000 on lots smaller than these, and more nearly on an equality with them than any other lots referred to, coupled with the opinions of the witnesses, we are of opinion that the amount which the dissenting arbitrator was prepared to award, viz., $4,700, is a fair and proper allowance. There will be judgment, therefore, allowing the appeal and awarding the appellant the sum of $4,700 with costs of the appeal as well as of the arbitration.

ALBERTA.

DECEMBER 21ST, 1909.

FULL COURT.

MORRIS v. SOBEY.

Partnership—Promissory Note Signed in Firm Name by Partner for Accommodation of Stranger — Absence of Consideration—Non-liability of Firm and other Partners —Partnership Ordinance, secs. 7, 9.

Appeal by defendant Sugarman and the defendants Sobey, Sugarman & Co., from the judgment of SCOTT, J., in favour of the plaintiffs against all the defendants, in an action upon a promissory note.

H. H. Parlee, for the appellants.

O. M. Biggar, for the plaintiffs.

The judgment of the Court (SIFTON, C.J., HARVEY, STUART, and BECK, JJ.), was delivered by

HARVEY, J.:—The defendant Willie sold his stock-in-trade as a general merchant to the defendant Sugarman. The terms of the sale are not very clear, but it appears that the purchase price was $2,200, and $500 in cash was paid.

Sugarman for a month carried on the business under the firm name of Sobey, Sugarman, & Co., the defendant Sobey being in charge. At the expiration of that time he sold the business back to Willie and made a settlement with him.

At the time of the sale by Willie there were certain claims against him, including one by the plaintiffs for something over $700. After the sale, of which the plaintiffs had learned, they requested Willie to get the defendant Sugarman to sign a note with him in their favour to secure this debt. Willie went to Sugarman and asked him to sign this note. Sugarman emphatically refused to sign any note or incur any liability in favour of the plaintiffs. Willie says that Sugarman told him that Sobey was in charge, and Willie therefore went to Sobey and asked him to sign the note, and Sobey signed the firm name to the note. Action was brought, some

two months after the resale to and settlement with Willie, against Willie, Sobey, Sugarman, and Sobey, Sugarman, & Co. The action was tried before my brother Scott without a jury. An attempt was made by the defence to prove that Sobey was not a partner at the time the note was signed by him. The learned trial Judge held that he was a partner, and gave judgment for the plaintiffs against all of the defendants, and from that judgment Sugarman, and Sobey, Sugarman & Co., now appeal.

Assuming that the finding of the learned trial Judge is correct as to Sobey being a partner, it appears to me that that does not end the difficulty. It is perfectly clear that Sobey had no express authority from his co-partners to bind the partnership; it it also clear that there was no ratification, for Sugarman states that he had no knowledge whatever of the note until he was served with the writ, or a few days before. The liability of the partnership, therefore, if any, must rest on the implied authority of one partner to bind the firm. Section 7 of the Partnership Ordinance (ch. 7 of 1899) provides that "every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of any partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners unless," &c.; and sec. 9 provides that "where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partner or partners."

In Brettel v. Williams, 4 Ex. 623, 19 L. J. Ex. 123, a member of a firm of contractors, to enable their sub-contractors to obtain certain material to carry out their contract, in the name of the firm guaranteed the sub-contractor's liability for the material. The Court held that this was not in the usual way of the business of the firm, and they were not liable. In that case it is clear that what was done was in the supposed interest and for the benefit of the firm. In the present case, however, there was no interest whatever in the firm's giving this note. Whatever the arrangements with Willie were, there was no liability to the plaintiffs, and no benefit was to accrue to the firm by the giving of this note. I can see no way in which the transaction can be looked at that can make it any part of the business of the

firm whatever. There was no consideration to the firm for giving the note. If one partner could give such a note and make the firm liable, I see no limit to the extent of his power to bind the firm. The transaction appears to me to be clearly outside the scope of the partnership business, and it comes quite within the terms of sec. 9 of the Partnership Ordinance.

The appeal should be allowed with costs, and the judgment in the Court below against the appellants set aside, and the action as against them dismissed with costs.

ALBERTA.

DECEMBER 21ST, 1909.

FULL COURT.

REX v. DUBOIS.

Criminal Law—Theft of Cattle—Criminal Code, sec. 989—Branding—Evidence—New Trial.

Case stated by BECK, J., at the instance of the Crown, after the trial and acquittal of the defendant on a charge of theft.

S. B. Woods, K.C., for the Crown.

A. A. McGillivray, for the defendant.

The judgment of the Court (SIFTON, C.J., HARVEY, STUART, and BECK, JJ.), was delivered by

SIFTON, C.J.:—In this case the accused was tried before Mr. Justice Beck at Red Deer on a charge of stealing a steer, the property of the Hatley Ranch Company, and was discharged. On the application of the Crown the learned Judge stated a case for this Court as follows:—

"Was I right in holding as I did that the evidence given herein did not shew possession by the said Dubois or by others in his employ, or on his behalf, of the animal in respect of which the charge was laid, so as to bring the case within the purview of sec. 989 of the Criminal Code, which reads as follows:—

"(1) In any criminal prosecution, proceeding, or trial, the presence upon any cattle of a brand or mark, which is duly recorded or registered under the provisions of any Act, ordinance, or law, shall be prima facie evidence that such cattle are the property of the registered owner of such brand or mark.

"(2) When a person is charged with theft of cattle, or with an offence under paragraph (a) or paragraph (b) of section 392 respecting cattle, possession by such person or by others in his employ or on his behalf of such cattle bearing such a brand or mark, of which the person charged is not the registered owner, shall throw upon the accused the burden of proving that such cattle came lawfully into his possession or into possession of such others in his employ or on his behalf, unless it appears that such possession by others in his employ or on his behalf was without his knowledge and without his authority, sanction, or approval."

Eliminating a large volume of immaterial matters, the evidence is as follows:—

On the 9th May last the steer in question was about 3 years old. It had on it the registered brand of the Hatley Ranch Company, put on at least two years before and not vented. It was proven to be still the property of the ranch company. The only other brand it had was the registered brand of John F. Dubois, the accused, put on about two months before, and still fresh and unhealed. In the early part of March there had been a branding at the ranch of the accused, in his presence, of animals afterwards turned out into his herd, which ran in the neighbourhood. This particular animal was found on the 9th May, in the words of one witness, "in charge of," in the words of another witness, "herded by," and another, "being driven up by," the son of the accused—a boy, age not stated, but apparently under 18 and living at home, and therefore under the control of his father legally, and at the time certainly in charge of his father's cattle, as this animal was one of a bunch of from 100 to 200 similarly branded with the Dubois brand, and, with the exception of a small number alleged by others to have been stolen from them, admitted to be the property of the accused. It was about 70 miles from the range of the Hatley Ranch Company, and had been missing a long time.

A large amount of testimony was given as to possibility of accident in branding, mostly of a very absurd nature.

The accused is admittedly a stockman of long and varied experience in all the range country on this continent, and I think it may be taken as an axiom that no honest stockman will brand a 3-year old steer, without careful examination, unless he has lately purchased it from a known and reputable person, and even then it would be much wiser if he did exercise care and see that so-called accidents do not occur. According to the evidence, it would appear that alleged respectable ranchers and stockbuyers do sell, do ship, do kill, and do brand cattle which do not belong to them, and, when they are found out, pay for them, which raises a strong presumption that there may be numerous cases which, not being found out, soon enough result in financial benefit to the so-called respectable people, and undoubtedly place them in the position of being cattle thieves under sec. 989 of the Criminal Code. And I am unable to see that the evidence given places Dubois in any better position. The statute was evidently intended solely to meet the peculiar circumstances of a ranching country where cattle are supposed to run at large, and this case is even stronger than usual, as the steer was not only branded with Dubois's brand, but was on his particular range, near where his family resided, and where he resided when at home, running with his own herd, a comparatively small and compact one, and in charge of his young son, being driven towards his pasture, and I am therefore of opinion that the ruling was erroneous, and that there has been a mistrial in consequence, and that a new trial should be directed.

ALBERTA.

DECEMBER 21ST, 1909.

FULL COURT.

EDMONTON CONCRETE CO. v. CRISTALL.

Injunction—Right of Property in Gravel Taken from Bed of Stream—Ownership of Crown—Possession—Labour Expended in Removing Gravel—Jus Tertii—Severance from Realty.

Appeal by the plaintiffs from the judgment of SCOTT, J., the trial Judge dismissing the action.

The reasons for the judgment of the trial Judge, in which the facts are stated, are as follow:—

SCOTT, J.:—The plaintiffs are engaged in the manufacture of concrete at Edmonton, and for that purpose required a large quantity of washed gravel. They accordingly entered into a contract with the Northern Dredging Company, who operated a gold dredge on the river Saskatchewan, to purchase from that company the gravel which was washed in passing through the dredge. By the terms of the written contract, the washed gravel was to be delivered in barges, to be supplied by the plaintiffs at the dredge, but, by a subsequent arrangement between the two companies, it was deposited in piles in the river, or on the shore thereof, at the rear end of the dredge, in the passage which had been cut by it in passing through the gravel bars. One of these piles was at the bar where the dredge had been laid up for the winter. One Burrill, a servant of the dredging company, who lived on the bank of the river adjacent to where the dredge was laid up, was placed by that company in charge of it, as well as of the pile of gravel at that point. He posted up a notice upon the end of the pile nearest to the dredge, the notice being to the effect that the gravel was the property of that company, and forbidding the removal of the portion of the pile nearest to the dredge. It appears that that portion of the pile was required to be retained in order to protect the dredge against floating ice in the spring.

The plaintiffs also posted a notice upon the other end of the pile claiming to be the owners of the gravel and forbidding its removal. About the 1st February, 1909, the defendants, or one of them, came to the pile with 3 teams, and started to remove gravel therefrom.

The notices referred to were posted up at that time, and, while they were loading the gravel, they were warned both by Burrill and the plaintiffs' manager not to remove the same, but the loads were completed and carried away. The plaintiffs immediately commenced this action, claiming damages for the gravel removed and an injunction restraining further removals, and obtained an interim injunction. As only 3 loads of gravel were removed, the damages the plaintiffs would be entitled to in case they succeeded in the action would be merely nominal.

Among the defences raised by the defendants are that the gravel in question was not the property of the plaintiffs or of the dredging company, and that it was the property of the Crown, and that it could only be removed or taken away with the permission of the Crown, and that the defendants had an equal right with the plaintiffs to remove it.

No evidence was given as to the ownership of the land from which the gravel was taken or upon which it was piled, or as to the right of the plaintiffs or the dredging company to remove or dispose of it. It appeared to be conceded by counsel for the parties upon the argument that the land of which the gravel formed a part was the property of the Crown. Counsel for the plaintiffs rested their claim to recover on the ground that they and the company from whom they purchased the gravel had made it valuable: and, as the plaintiffs were in possession of it at the time of its removal by the defendants or one of them, it is not open to them to set up a jus tertii.

In my opinion, the plaintiffs were not in possession of the gravel, or at all events the possession was not such as precludes the defendants from setting up a jus tertii. It may be that what the plaintiffs and the company whose rights they acquired did was the utmost that could be done towards taking possession of the property of another upon the land of another, but that, in my opinion, falls short of what constitutes actual possession. To hold the contrary would be to hold that the plaintiffs could take possession of all the gravel bars in the river and prevent any person other than the servants or grantees of the Crown from removing any gravel therefrom.

I was at one time impressed with the view that the plaintiffs had acquired certain rights in the gravel by reason of the fact that the company from whom they purchased had rendered it more valuable by expending work and labour upon it, and that an action might be maintained for the purpose of protecting such interest. I find, however, that the judgment of the Privy Council in Glenwood Lumber Co. v. Phillips, 73 L. J. P. C. 62, points to the contrary view.

I give judgment for the defendants with costs.

The appeal from this judgment was heard by SIFTON, C.J., HARVEY, STUART, and BECK, JJ.

J. R. Lavell, for the plaintiffs.

C. F. Newell and S. E. Bolton, for the defendants.

HARVEY, J.:—This is an appeal from the judgment of my brother Scott. The facts are set out at length in his reasons for judgment, and I will not repeat them here.

To my mind, the only question that requires to be answered is, were the plaintiffs in possession of the gravel? For it is thoroughly well established that the person in actual possession of land or goods, though not the owner, is entitled to retain that possession as against every one but the rightful owner What are the facts of this case from which to find such possession? The gravel was in a river or on the banks, admitted by counsel to be the property of the Crown. There was a notice on it stating that it was the property of the plaintiffs, which, of course, was not strictly true. This apparently was the only evidence of possession constantly existing; an employee of the dredging company was living near the dredge, which was at one end of this pile of gravel, and an attempt was made to shew that it was a part of his duty to remain in charge of the gravel claimed by the plaintiffs; but I am satisfied from the evidence that this was no part of his duty, and that he was there solely on behalf of the dredging company and in charge of only so much of the pile of gravel as was necessary to protect the dredge.

While the defendants were removing the gravel, this man, at the request of the plaintiffs' manager, notified the defendants that the gravel had been disposed of to the plaintiffs, and the plaintiffs' manager himself, who also arrived while the defendants were taking the gravel, notified him that it belonged to the plaintiffs, and forbade its being taken.

Assume that all these facts were applied to a bed of gravel in the river, in its natural state, would it constitute possession. I have been able to find no authority that would justify an affirmative answer. Then, does the fact that labour had been expended on this gravel, making it more valuable, affect the question? I cannot see how it would make possession what otherwise would not constitute possession, nor have I found any authority for the conclusion that it would confer any property rights. There is no doubt that the Crown, the true owner, could prevent the plain-

tiffs from getting the least benefit from this gravel, notwithstanding the expenditure of labour on it. It seems to me that that fact involves the conclusion that the plaintiffs have no property rights in the gravel, and can maintain any claim against others only by having it in possession.

In the case of The Winkfield, [1902] P. 42, in which the right of the possessor as against every one but the true owner was distinctly laid down, the party claiming as possessor was the Postmaster-General in respect of mails lost on a ship. On the appeal it was argued that the mails were not in the possession of the Postmaster-General but of the ship which was lost. If this argument had been considered, it might have been helpful for this case, but the Court refused to consider it, as they regarded it as not open to the parties owing to the course of the case.

In Glenwood Lumber Co. v. Phillips, 73 L. J. P. C. 62. the appellant had, without any license to do so, cut down trees on the lands of the Crown, and thus given them a greater marketable value. It was held that he was not entitled to take them out of the possession of the person who subsequently was rightfully in possession of the land. Now, I think it is clear that possession alone can only prevail as against a stranger, i.e., one having no property rights, and it seems necessarily, therefore, to follow from this case that the work done gave no rights of property.

The conclusion also follows that the possession of goods situate on land goes with the possession of the land, and the gravel in the case before us must then have been in the possession of the Crown, the real owner, and I think that any possession by any other person which would be available as against others, if not indeed an actual physical possession, at least would require to have some marks indicating some actual physical control. To my mind, the facts of the case do not indicate any such possession, and I am therefore of opinion that the appeal should be dismissed with costs.

SIFTON, C. J., concurred.

STUART, J.:—The plaintiffs ask an injunction to prevent the defendants from removing certain gravel in the bed of the Saskatchewan river near Edmonton. No title in the plaintiffs was shewn, and their case is rested solely on possession. It is, no doubt, true that mere possession is suffi-

cient to give a right as against a stranger, and this whether real or chattel property is in question. Prima facie, however, a pile of gravel lying in the water on the bed of a river in this country is part of the soil and of the freehold. In my view, it was incumbent upon the plaintiffs, having framed their case upon the assumption that the pile of gravel in question was a chattel, to shew that it was such in reality and how it had become such. The statement of claim says nothing of a trespass to a certain piece of land of which the plaintiffs were in possession. We are asked merely to assume that this gravel pile on the bed of a river, where a gravel pile constitutes so often the natural position and condition of the soil, is in reality a chattel. For myself, I should refuse to make that assumption, and should rather ask the plaintiffs to explain the circumstances by reason of which the pile of gravel became a chattel. I can find nothing in the evidence which convinces me that this gravel was ever severed from the soil so as to change its nature as property. The dredging company, it is true, were dredging in the river for gold, and passed the gravel through their dredge in the search for grains of gold among it, and then piled it up behind their dredge when they were through with it. It is also true that in this operation they washed it clear of dirt and sand so as to leave it pure gravel, and that they intended to sell the gravel, and did agree to sell it to the plaintiffs. No doubt, an intention to sever the gravel from the realty existing in the mind of the owner of the freehold would, in such circumstances, amount to a severance, but it is not shewn that the dredging company were the owners of the soil. Neither is it shewn that they had any other right of any kind to do any act or to entertain any intention with regard to the gravel which would constitute a severance. In my opinion, therefore, the plaintiffs failed to shew that the gravel was chattel property at all. To place this obligation upon them is a different thing from asking them to shew title, which, of course, they do not have to do. But, when they allege that this gravel lying in the river bed in a pile, just as gravel so generally does, is not part of the realty, but a chattel, I think, as I have said, that it was incumbent upon them, before asking an injunction, to shew how it came to be so severed from the soil as to be a chattel. This, I think, they have failed to do, and, as they do not complain of a trespass to land, I think they

cannot succeed. The facts in Boileau v. Heath, [1898] 2 Ch. 301, were not exactly the same as here, but the case is, I think. worthy of attention with reference to the present dispute.

With respect to the possession of the plaintiffs, I have very grave doubt in any case whether there were sufficient facts proven to constitute it. But there is, I imagine, room enough for a difference of opinion as to this, and I prefer to rest my decision on the grounds I have stated.

The appeal should be dismissed with costs.

BECK, J. (dissenting):—The Northern Dredging Company were engaged in dredging for gold on the Saskatchewan river near Edmonton. The method of operation was that the dredge lay in the water facing up-stream, and the bucket at the bow of the dredge took the gravel from a bar in the river in front or at the side of the dredge within a distance of 75 to 100 ft.; the gravel was passed through the dredge and was dropped behind the dredge into a pile covering a space of 25 to 30 feet and rising to a height of 8 or 10 feet above the surface of the water.

The dredge was working in the same locality during the seasons of 1908 and 1909. I think it should be assumed that the dredging company were operating under lease from the Dominion government, or, at all events, with the assent of the government. It is common knowledge that placer mining has been going on on the Saskatchewan river in the vicinity of Edmonton by means of "gizzly" or dredge under lease or license issued under governmental relations for the past 10 or 15 years, and that there is at Edmonton a Dominion lands office from which are issued miners' licenses, and in which records relating to licenses and leases are kept. If these facts are thought to have any bearing on the result. I think the trial should be taken to have proceeded on the understanding that these facts were known and impliedly admitted on both sides. In this view, I think, as I have intimated, it is to be inferred that the dredging company were operating with the authority of the Crown. In April, 1908, the dredging company entered into an agreement with one Keely to sell to him, at 22 cents a cubic yard, 20,000 cubic feet of gravel taken up and passed through their dredge during each of the seasons of 1908. 1909, 1910, and 1911. The agreement provided that the gravel should be

delivered direct from the belt conveyor or other tailing device on the dredge to barges to be furnished by Keely, and that the barges should be attached by him to the dredge during the time the gravel was being delivered, and be maintained in proper position for the distribution of the gravel therein.

By instrument of the 2nd July, 1908, Keely assigned this agreement to the plaintiffs—the Edmonton Concrete Company. The concrete company took gravel from the dredging company during the years 1908 and 1909, in pursuance of the agreement. The gravel, however, was not delivered into barges, because the dredging company's machinery broke down, and the company could not deliver the gravel until the water got so low that the concrete company could not bring the barges to the part of the bank of the river at which they intended to unload them. In consequence of this, arrangements were made between the two companies under which the dredging company piled the gravel up in the river so that the concrete company could get it in the winter time.

For the purpose of delivering the gravel into the barges, an apparatus in the nature of an elevator was attached to the dredge, and this apparatus was used in piling up the gravel in the bed of the river. The cost of this apparatus, the necessity for which was occasioned by the contract, appears to have been $260. The plaintiffs, who advanced the whole price, were, under certain conditions, to receive credit for one-half of it, the apparatus becoming then the property of the dredging company.

The plaintiffs' business was the manufacture of concrete blocks, sewer pipes, etc., for which they used cement, sand, gravel, and crushed stone, and the reason for the agreement to take this gravel from the dredging company was that the gravel was intended for use in the manufacture of concrete sewer pipes for the city of Edmonton, and it was found that gravel taken in its natural state, which for 3 or 4 years the plaintiffs just "went and took," without objection, from the river, failed to satisfy the city engineer and city inspector, and that, in order to do so, it was necessary that the gravel should be washed so as to free it from sand, coal dirt, etc. The passing of the gravel through the dredge effected this, with the result that the gravel was "thoroughly screened and cleaned," and ready to be put directly into a

stone crusher. There were 3 of these piles of gravel in a line along the river lying about three-quarters of a mile the one from the other. "Two of them were small and didn't amount to much." The concrete company took from these two all it wished—100 cubic yards from each—and there is no controversy about them. Only one of the piles, therefore—the large one—was really in question in the action. This pile was about 160 feet in length and from 25 to 30 feet in breadth at the bottom, and ran up to a peak or ridge at the top, and was from 8 to 10 feet above the surface of the water.

Soon after the ice took in the river in the winter of 1908, i.e., about the 1st December, the concrete company put a notice on each of the 3 piles to the effect that it belonged to the Edmonton Concrete Company, and that all persons were forbidden to take the gravel. There was also a man living in a "shack" on the bank of the river about 250 yards from this pile. He was in the employ of the dredging company, but a share of his wages the plaintiffs were to pay. It was his duty to watch the gold dredge, which was lying near by, and this pile of gravel. Both the dredge and the gravel were within view from the shack. The dredging company also put two notices on this pile of gravel near the end next to the dredge, the first to the effect that the gravel belonged to the dredging company, and forbidding removal, and the second that the portion nearest the dredge was required to protect the dredge.

Some time, apparently, about the end of the first week in December, 1908, the concrete company began hauling the gravel to Edmonton. There was no interference with them until about the 1st February, when the defendants sent men with teams to haul the same gravel. These men took gravel from the same place in the pile as the plaintiffs had been taking it. They took it although the defendants knew all the facts and circumstances upon which the plaintiffs based the claim to the gravel, and in spite of an attempt made at the pile to stop them and of the plaintiffs' notice being then on the pile; the defendants having previously deliberately taken the position that they had as much right to the gravel as the concrete company.

This action was immediately commenced (i.e., on the 3rd February), claiming an injunction and damages. It was tried before my brother Scott without a jury. He dismissed

the action with costs, stating as his opinion that the plaintiffs were not in possession of the gravel, or, at all events, the possession was not such as precluded the defendants from setting up a jus tertii, namely, the ownership by the Crown. With much respect for the opinion of the learned trial Judge, I cannot agree in that opinion. Indeed there is no hesitancy in my mind in coming to the opposite conclusion. It is settled law that "a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrong-doer, and cannot defend himself by shewing there was title in some third person, for against a wrong-doer possession is title:" Jeffries v. Great Western R. W. Co., 25 L. J. Q. B. 107, 5 E. & B. 802; Glenwood Lumber Co. v. Phillips, 72 L. J. P. C. 62.

The sole question, therefore, in the present case, is: Were the plaintiffs in possession of the gravel pile in question at the time of the alleged trespass or conversion by the defendants—who admittedly had, themselves, no title.

The whole subject of possession is dealt with in Pollock & Wright on Possession, and the Encyclopædia of the Laws of England, 2nd ed., vol. 11, tit. "Possession," pp. 319 et seq. "Possession is usually said to consist of two elements —physical control and intention to possess:" Encyc., p. 319. "In principle, the requirements of possession are the same" (in the case of goods) "as in the case of land, namely, physical control to the exclusion of others:" Encyc., p. 321. "The facts which are taken to shew exclusive physical control vary according as the subject-matter is land or goods:" Encyc., p. 320. "When the object, as a whole, is incapable of manual control, and the question is merely who has de facto possession, all that a claimant can do is to shew that he, or some one through whom he claims, has been dealing with the object as an occupying" (or possessing) "owner might be expected to deal with it, and that no one else has done so. Omnia ut dominum gessisse is, for English as well as for Roman lawyers, a good working synonym of in possessione esse:" Pollock & Wright, p. 30; Encyc., p. 320.

By possession is meant possession of that character of which the thing is capable: Lord Advocate v. Young, 12 App. Cas. 556.

"The requirement of exclusive user has sometimes been stated in such terms as to imply that there must be power

to exclude all foreign interference; but this is not correct. That occupation is effective which is sufficient as a rule and for practical purposes to exclude strangers from interfering with the occupier's use and enjoyment. Enclosure by fences or otherwise is the usual mark of exclusive possession; but this is not necessary. The question is whether other claimants are in fact excluded. Moreover, the requirement must not be pressed too far:" Encyc., p. 321, citing authorities.

The plaintiffs had the intention to possess not only the gravel composing the pile in dispute, but the soil on which it lay. They had, too, in my opinion, the physical control to the exclusion of all others (claiming adversely), having regard to character of the thing of whose possession there is question, namely, the soil under the pile of gravel and the pile itself—of the soil, by reason of the gravel being upon it—of the gravel, by reason of the acts of ownership exercised upon it in, and in the course of placing it there, and in enhancing its value as a commercial commodity, and by reason of those acts done for the purpose of excluding all others from the soil and the gravel, namely, collecting and cleaning the gravel; piling it so that, both from the fact of its being in a pile and of its being clean, it was apparent to every one that it had been placed where it was for a special purpose; drawing portions of it away continuously—a thing which must have been obvious merely on a view of the pile; posting notices upon it claiming ownership, and forbidding interference, and having a caretaker in charge of it.

All these things seem to me just as effective means of excluding other persons as building an ordinary fence about the pile—which I suppose few would suggest would be insufficient. It has been suggested, however, that, because of the fact that the true title to both the soil and the gravel was in the Crown, different considerations should prevail. I can see no reason for a difference, and there seems to be apt authority to the contrary.

In Pollock & Wright on Possession, p. 34, it is said: "It has long been settled by English authorities that acts of dominion, such as taking sea weed, sand, and stones on the foreshore, done without interruption by an owner of the adjacent land down to high-water mark, who deduces his title from the Crown, are sufficient proof of de facto possession

to be evidence of legal possession under the same title, and therefore evidence that the foreshore was comprised in the grant by the Crown."

It seems clear, therefore, that, for the purposes under consideration, de facto possession is just as effective against the Crown as against a subject.

For the reasons above indicated, I think the appeal should be allowed with costs, and that judgment should go granting the plaintiffs the injunction asked and a reference as to damages, and that the plaintiffs should have their costs in the Court below.

ALBERTA.

DECEMBER 21ST, 1909.

FULL COURT.

RE CONFIRMATION OF LOCAL IMPROVEMENT TAX RETURN.

Assessment and Taxes—Alberta Local Improvement Act, 1907, sec. 91—Liability of Land Company, Entitled to Patent for Land, to Assessment before Patent—Dominion Railway Land Grant—Property of the Crown—B. N. A. Act, sec. 125—Beneficial Interest in Company—Legal Estate in Crown—"Belonging to"—Charge in Favour of Crown—Forfeiture—Personal Assessment—Interest in Land.

Appeal by the Calgary and Edmonton Land Co. from an order of SIFTON, C. J., confirming the return of the Tax Commissioner of the Alberta Department of Public Works in respect of local improvement district No. 607, under the provisions of sec. 91 of the Alberta Local Improvement Act, 1907, so far as the return related to the north-east quarter of section 3, township 16, range 2, west of the 5th meridian.

The appeal was heard by HARVEY, STUART, and BECK, JJ.

R. B. Bennett, K.C., for the company.

S. B. Woods, K.C., for the Minister of Public Works.

BECK, J.:—The Act of 1907 was a revision of ch. 24 of 1903, as amended by ch. 8 of 1904 and ch. 11 of 1906.

The taxes in arrear in respect of which the order for confirmation was made were those for the year 1906, which were imposed under the authority of the Act of 1903. The parties assessed were the Calgary and Edmonton Land Company, to whom a patent issued only on the 19th June, 1907.

Section 49 of the Act of 1903 provides that "the council may cause to be levied in each year . . . a tax . . . upon every owner or occupant in the district for all land owned or occupied by him."

Section 2, sub-sec. 13, is: "'Owner' includes any person who has any right, title, or estate whatsoever or any interest other than that of a mere occupant in any land."

The question we have to decide is, whether the patentees were liable to assessment in respect of the land in question prior to patent, so as to admit of the application of the provisions of the Act, whereby ultimately, in default of payment, the land should be "absolutely vested in His Majesty freed from all liens, mortgages, and incumbrances of whatever nature and kind the same may be:" sec. 87 of 1903; sec. 95 of 1907.

There is a clause in the Act providing for certain exemptions from taxation, but it has no bearing upon the questions we have to decide.

It is necessary to explain in what way the Calgary and Edmonton Land Company became entitled to a patent for this land.

By statute of Canada 53 Vict. ch. 4, provision was made for the grant by the Governor in council of a subsidy in land to the Calgary and Edmonton Railway Company from Dominion lands to an extent not exceeding 6,400 acres for each mile of the company's railway from Calgary to a point at or near Edmonton on the North Saskatchewan river, a distance of about 190 miles; and also to the extent of 6,400 acres for each mile of the company's railway from Calgary to a point on the international boundary between Canada and the United States, a distance of about 150 miles.

Section 2 of the Subsidy Act provided that "the said grants and each of them may be made in aid of the construction of the said railway . . . in the proportion and upon the conditions fixed by the orders in council made in respect thereof, and, except as to such conditions, the said grants

shall be free grants, subject only to the payment by the grantees . . . of the cost of survey of the lands and incidental expenses at the rate of ten cents per acre in cash on the issue of the patents therefor."

By order in council of the 27th June, 1890 (cancelling previous orders), provision was made for the grant of Dominion lands to be made on conditions therein set forth in aid of the construction of the Calgary and Edmonton Railway Company. This was followed by an order in council of the 19th November, 1891. The report upon which this latter order in council was founded was as follows:—

"A report of a Committee of the Honourable the Privy Council, approved by His Excellency the Governor-General in council, on the 19th November, 1891.

"On a report dated the 18th November, 1891, from the Minister of the Interior, submitting the following:—

"(1) That by an order of your Excellency in council, dated the 27th June, 1890, provision was made for a grant of Dominion lands to be made, on conditions therein set forth and stated, in aid of the construction of the Calgary and Edmonton Railway at the rate of 6,400 acres per mile of the line from Calgary to Edmonton, and from Calgary south to the international boundary, the sanction of Parliament thereto having been obtained at the then next preceding session; and that a contract for the construction of the railway, in conformity with the provisions of the said order in council, was duly made and entered into between the company and the government.

"(2) That one of the said conditions was that the grant to the company should be made up of the unoccupied and unclaimed odd-numbered sections at the disposal of the government, or, if so agreed upon between the company and the government, out of alternate townships (exclusive of school and Hudson's Bay Company's sections), within 22 miles of the line of railway on each side thereof, in so far as practicable without interfering with any previous grants or reserves; and the company have elected to accept the first alternative mentioned, and have submitted to the Minister of the Interior a partial list of such sections, as enumerated in the schedules hereto marked A. and B., comprising an area of about 841,309 acres, which the Minister of the Interior is having examined by the proper officers of his Department with a view to deciding to what extent they are available

for the purposes of the land grant to which the company may be found to be entitled.

"(3) That by orders in council, dated respectively the 14th July and the 5th September last, authority was granted to the Minister of the Interior, for the reasons therein stated, to convey to the company the land grant applicable to the whole of the line between Calgary and Edmonton, 190 miles in length; and that the company are now entitled to have conveyed to them, on payment of the cost of survey and incidental expenses, fixed at 10 cents per acre, 1,216,000 acres, being at the rate of 6,400 acres per mile for the 190 miles, subject to reduction for the present of one-third of that area, to be held by the government as security under another contract made and entered into between the government and the company, in case the amount of money earned by the company for the services to be performed, as provided for by the said contract, should not amount to the sum of the subvention in money paid by the government (a net area of 810,666.66 acres).

"(4) That it is advisable, since the full area to which the company are already entitled cannot be found within the belt of 22 miles along the line of the road between Calgary and Edmonton, and since it is highly probable that within the time specified in the contract between the company and the government, namely, the 1st November, 1893, the land subsidy will be earned for the section of the line between Calgary and the Old Man river, a distance of about 110 miles, being about 704,000 acres (no portion of which, however, is to be withheld for the present, as in the case of the section between Calgary and Edmonton), that provision should be made by your Excellency, in accordance with the paragraph number 3 of the terms and conditions of the order in council of the 27th June, 1890, to make provision for making up to the company, out of available lands in the North-West Territories, any deficiency which may be found to exist in the area to which the company will be entitled for the construction of that portion of their line lying between Edmonton and the Old Man river, a distance of about 300 miles in all, when the available odd-numbered sections within the belt of 22 miles on each side of the line described by the order in council of the 27th June, 1890, have been exhausted.

"The Minister accordingly recommends that, in addition to the available odd-numbered sections in the belt of

22 miles on each side of the line of the Calgary and Edmonton Railway, which, by the order in council of the 27th June, 1890, are set apart for the purposes of the land grant to that railway, there be reserved and set apart, for the said purposes, the unoccupied and unclaimed odd-numbered sections in the several tracts of land coloured yellow upon the map hereto attached, the area of the odd-numbered sections in the tracts so coloured, and within the belt of 22 miles on each side of the railway, making altogether about 1,520,640 acres; this area, however, being subject to reduction on account of lands therein which may be found to be not fairly fit for settlement or which may have been disposed of or reserved prior to the date of the order in council of the 27th June, 1890.

"The Minister further observes that there are tracts of land at present held under lease from the government for grazing purposes in the vicinity of the line of the railway, including an area of about 500,000 acres, in respect of which he recommends that, from time to time, as the leases under which these lands are held become inoperative, the Calgary and Edmonton Railway Company shall have the first right to the odd-numbered sections which may thus be placed at the disposal of the Government."

The quarter section in question was included in schedule B, which is intituled "lands applied for as second part of grant for the first 190 miles." The lists constituting both schedules had been sent in by the railway company to the Department of the Interior by way of application for allotment of the lands listed. The meaning, as I understand it, of the words "as second part of the grant for the first 190 miles" is that the lands so listed were claimed not as falling within the description of "the unoccupied and unclaimed odd-numbered sections at the disposal of the government . . . within 22 miles of the entire line of railway on each side thereof" (which were referred to as "the first part of the grant"), but (inasmuch as the full area to which the company were already entitled could not be found within the belt of 22 miles along the line of the road between Calgary and Edmonton), of lands elsewhere than within that belt; namely, within the like belt on the southern portion of the line and ultimately, if necessary, out of available lands in the North-West Territories.

It seems to be clear that, when the company applied for this particular land, the circumstances were as follows: that the land in question was applied for by the company in respect of the portion of the line between Calgary and Edmonton; that the company were already entitled to an area sufficient to justify the quantity applied for; that the available lands within the 22-mile belt between Calgary and Edmonton were exhausted; that the land in question was within the 22-mile belt south of Calgary; that, since no portion of the southern belt was to be withheld as security to the government, this land was not included in the land to be withheld; that, if the land was not comprised in an outstanding grazing lease, if it was unoccupied and unclaimed, and if it had not been disposed of or reserved prior to the 27th June, 1890—in other words, if it was available for the purposes of the land grant—all the conditions had arisen to entitle the company to a free grant of the land, subject only, on the issue of the patent, to a charge of 10 cents an acre or $16 for expenses of survey, &c.

The question whether it was fairly fit for cultivation, being a condition in favour of the company, may be put aside, as the company must be taken to have waived any such inquiry by applying for the land.

By a deed dated the 13th December, 1902, the Calgary and Edmonton Railway Company "bargained, sold, assigned, transferred, and set over" to the Calgary and Edmonton Land Company—not its rights under the Subsidy Act and the orders in council, but—"all its estate, right, title, interest, claim, and demand" in and to certain designated lands, comprising some 49,000 odd acres, including the land in question, without any provision for substitution of other lands or reduction of the consideration in the event of the grantees failing to obtain patent.

This instrument—one of a number of like character—was filed in the Department of the Interior, presumably shortly after its execution.

In my opinion, the railway company became entitled to demand of the Crown a patent for the land after the lapse of such a length of time as was reasonably sufficient to enable the officers of the Crown to ascertain whether in fact the land was available for the purposes of the land grant. It seems to me that the right of the railway company to the patent did not depend upon the result of the investigation

of the Crown officers, but upon the actual facts. If, when the company applied for patent, the land as a matter of fact was not included in a grazing lease; if, in fact, it was unoccupied and unclaimed; if, in fact, it had not been disposed of or reserved prior to the 27th June, 1890—then the company's right to it was absolute, independently of any consent or assent on behalf of the Crown. That right was one arising out of a contract for the construction of the railway between the company and the government (referred to in the order in council) made in pursuance of the Subsidy Act and the order in council of the 27th June, 1890. (See Government of Newfoundland v. Newfoundland R. W. Co., 13 App. Cas. at p. 207.)

In a proceeding by the railway company against the Crown to enforce the right to a patent, no doubt the onus would be upon the company to prove the existence of those facts which would shew the land to be in fact available for the purposes of the land grant. It seems to me, however, that a presumption would arise, against the company, that the land was available immediately they asked for its allotment; but, even if not so, at any rate from the moment they undertook to deal with it as their own, as they did by the instrument of the 13th December, 1902, ultimately followed as it was by the issue of the patent to the purchaser therein named.

Mr. Bennett, K.C., for the company, urged against any such view as this, that, the question involved being one under an assessment statute, no presumptions could be made against the party sought to be taxed, and that the onus of proof in all respects lay upon the authority seeking to tax. I think there is no such exceptional rule of evidence. The rule Mr. Bennett had in mind is, no doubt, the rule that statutes providing for assessment and taxation are to be construed strictly against the authority in whose favour they are made: see cases collected in Beal's Cardinal Rules, 2nd ed., p. 436. That means nothing more, I think, than that it must be quite clear, upon the face of the statute, that the person or property sought to be taxed comes within the class of persons or property intended by the statute. There must, too, be strict compliance with the procedure laid down in the Act to bring about the valid imposition of the tax; but less strict compliance with the procedure for collection

of the tax, once shewn to be validly imposed, may be sufficient: Cotter v. Sutherland, 18 C. P. at p. 390.

There is, as I have said, no exceptional rule of evidence in relation to taxing Acts that I am aware of, affecting the onus of proof on any question as to the ownership of property, such as may arise in an ordinary action involving title.

Then Mr. Bennett contended that until patent the land could not be assessed, in consequence of sec. 125 of the British North America Act, which reads: "No lands or property belonging to Canada or any province shall be liable to taxation." Mr. Woods, Deputy Attorney-General, contended that the land in question was not land belonging to Canada, notwithstanding that the bare legal estate—but that only—remained in the Crown in right of the Dominion; that in any case the Act under which the assessment was made does not purport to authorise the assessment of the land itself, but only of the owner or occupant in respect of the land; and that the procedure in respect of the land is a mere remedy for the collection of a personal tax, which possibly could not be enforced against the land until after patent. In the view I take, it is unnecessary for me to consider the distinction thus raised by Mr. Woods, and I therefore treat the case as if there were a direct assessment of the land.

In my opinion, inasmuch as the whole beneficial interest in the land was vested in the company, and only the bare legal estate remained in the Crown, the land was not land belonging to Canada within the meaning of sec. 125 of the British North America Act.

The decision of the question in issue, to my mind, turns entirely upon the meaning of that provision. A large number of cases were referred to during the course of the argument. The greater number were cases in which the question was whether the land came within the meaning of certain special provisions for exemption from taxation. They appear to me to be of little assistance in the present case.

What is the meaning of the words "belonging to"? Prima facie it is their ordinary meaning.

In a case between an individual vendor and purchaser, under an agreement, where the whole purchase money has been paid, and the purchaser is entitled to a transfer on request, in my opinion the purchaser could, and the vendor could not, swear that he was the owner of the land—that the land belonged to him—simpliciter. So here, in my opinion,

an officer of the company could, long prior to patent, with an absolutely clear conscience and without hesitation, have sworn simpliciter that the land in question was land belonging to the company, and a representative of the Crown could not simpliciter swear that it was land belonging to the Crown.

The only conceivable reason for the exemption clause in question seems to be to protect the interest of the Crown. In the case under consideration, as soon as the whole consideration entitling the company to a free grant had passed to the Crown, the Crown had no interest.

Authority for the interpretation I have given to the words "belonging to" seems to me unnecessary, but reference may be made to Doe v. Terry, 5 L. J. M. C. 27; and other cases discussed in St. Nicholas Deptford v. Sketchley, 17 L. J. M. C. 17.

I have no doubt at all that the company could have enforced their right to a patent by petition of right: Qu'Appelle Long Lake and Saskatchewan R. and S. Co. v. The King, 7 Ex. C. R. 108; but, were this not so, I think that, with respect to the land in question, it could not properly be spoken of as land in question, it could not properly be spoken of as land belonging to the Crown, because of the principle stated in Craig v. Templeton, 8 Gr. 483, the infallible justice of the Crown being equivalent to the right to compel specific performance in ordinary cases.

During the course of the argument, I suggested a difficulty by reason of the 10 cent per acre charge against the land in favour of the Crown. On consideration, the difficulty has disappeared from my mind. There seems to be more than one answer to it:—

(1) The words of the section of the Subsidy Act are, "Subject only to the payment . . in cash on the issue of the patent." First, the patent issues, i.e., the legal title has passed from the Crown. Then—eo instanti perhaps—the money is payable. It may be questionable whether, even then, the payment is a charge upon the land, or merely a right of physical retainer of the patent; but, even if a charge upon the land, no reason occurs to me why the land, subject to the charge, should not be subject to all provincial laws relating to property and civil rights; the rights of the Crown by virtue of the charge being unaffected, unless the Crown be expressly made subject to such provincial laws—a thing

which I fancy cannot be effected by provincial statute with respect to the Crown in right of the Dominion.

(2) Under the Assessment Act in question, I see no reason why the order vesting the land in the Crown in right of the province should not expressly preserve the rights of the Crown in right of the Dominion.

(3) Were no such reservation made, and assuming that, in consequence of the provisions of our Land Titles Act, the title of a subsequent certificated owner would be free from the charge in favour of the Crown in right of the Dominion, which may well be doubted, no practical injury to the rights of the Crown in right of the Dominion would result, since, inasmuch as the vesting order vests the land in the Crown in right of the province, the province would be accountable to the Dominion for the amount of the charge.

(4) Inasmuch as it appears that the patent for the land in question has not only been issued but sent to the registrar of land titles, and that a certificate of title has been issued thereon to the company, it must be taken that the Crown in right of the Dominion has now no charge upon the land.

For the reasons indicated, I am of opinion that the learned Chief Justice was right in confirming the return with respect to the land in question, and that the appeal from his order of confirmation should be dismissed with costs.

HARVEY, J., concurred.

STUART, J.:—In this case I quite readily agree, for the reasons given by my brother Beck, whose judgment I have read, that in the year 1906 the appellant company had an interest in the land in question, and I think they were at least personally subject to taxation with respect to that interest. I have had much more difficulty, however, in concluding that the land can be made subject to the forfeiture clauses of the Ordinance. Section 57 of the Ordinance says "that the taxes accruing upon or in respect of any land in the district shall be a special lien upon such land." And it is, no doubt, by virtue of this section, and by virtue of other sections such as secs. 52 and 85, that the assessment is generally understood to be made upon land itself rather than upon the person, although there are other sections which point rather to the view that the land is not itself assessed. but the person only. Assuming, however, what I take to be

the correct view, that it is the land which is assessed, and not the person, it can only be the interest which the person has which is subject to assessment. It is upon this interest only, therefore, that the lien can be said to rest, and this interest only, I should think, that can be eventually condemned. What was the extent of the appellants' interest? If it was the whole beneficial interest, leaving the Crown a bare trustee holding the bare legal estate, whose transfer to the appellants subsequently was a mere matter of form, I do not see that there could be any obstacle in the way of forfeiting subsequently the mere legal estate, which had by that time passed to the company, and exists solely for the purpose of supporting the beneficial interest.

But was the whole beneficial interest in the company? They were entitled to a patent upon a condition, viz., that they paid the sum of $16 to the Crown for survey fees. The Crown certainly had a right to retain the patent until these were paid, and I fancy in practice the Crown would insist upon payment before delivery of the patent, and indeed before the preparation and execution of it. The Crown had, therefore, it would appear to me, something more than the bare legal estate in the land when the tax was levied upon the appellants with respect to their interest in it. Nevertheless, it is now the whole estate, legal and equitable, that is to be forfeited, that is, something more than was taxed and subject to the lien. I have a difficulty here which has troubled me greatly, but I think it may be said that the $16 for survey fees was merely an incumbrance on the company's equitable interest, like a small balance due to an ordinary vendor, and that, the incumbrance having been paid off, there is no reason why the lien should not attach to the whole beneficial interest, now free from this incumbrance.

I have more difficulty, however, when I come to consider the words of sec. 2 of 53 Vict. ch. 4, the Act under which the land subsidy to the appellants' grantors was granted. It is enacted that "the said grants shall be free grants, subject only to the payment by the grantees" of the survey fees. It was decided by the Supreme Court of Canada, in the well known school tax case in which the Canadian Pacific Railway was interested, that the word "grant," in sec. 16 of the contract with this latter company, meant the issue of the patent. In this section before us it must mean the same. The issue of the patent, the grant from the Crown, is to be a free grant.

How can it be said to be a free grant, when the land granted is already subject to a lien for taxes? Suppose the appellants, when they came to pay their survey fees of $16 and to receive their patent, had said: "We will only pay you $14 because a tax of $2 has been imposed upon this land. You, the Crown, are required by statute to give us a free grant. This $2 tax, therefore, you must pay; otherwise we take it not "free" but with this incumbrance upon it." Aside altogether from the Crown's right to the benefit of sec. 125 of the British North America Act, and assuming for the moment that there were no exemption of Dominion lands, could the Crown refuse to meet this tax, in the circumstances? What answer could the Crown give when a person who is entitled to a free grant insists that the grant shall be free, as the law says? The answer would, I think, be this, that in an ordinary vendor and purchaser agreement, in the absence of any stipulation as to payment of taxes, the purchaser is bound to pay taxes accruing after the time fixed for completion, and after he becomes entitled to possession. In the present case the company were entitled to their patent and to possession long before the tax was imposed, and, as between themselves and the Crown, they were bound to pay the tax, and could not throw the burden back upon the Crown. That being so, the terms of the Parliamentary contract would be strictly complied with, and the Crown would be fulfilling all its obligations without clearing the land of the taxes imposed after the company became entitled to the patent and to possession, especially as it is not suggested that the failure to issue the patent was in any way the fault of the Crown.

I think the appeal should be dismissed with costs.

ALBERTA.

BECK, J. DECEMBER 23RD, 1909.

TRIAL.

SMITH v. SUGARMAN.

Bankruptcy and Insolvency—Assignment for Benefit of Creditors—Action by Assignee to Set aside Conveyance of Land Made within Sixty Days of Assignment—Absence of Intent to Prefer—Setting aside Conveyance—Incumbrances—Interest — Use and Occupation — Charges on Land—Parties—Costs.

Action by an official assignee to set aside a conveyance of land as fraudulent.

C. A. Grant, for the plaintiff.

H. H. Robertson, for the defendants.

BECK, J.:—The debtor, Willie, executed the assignment to the plaintiff on the 15th December, 1908. The land, the subject matter of the action, was bought by Willie from one Darling, who resided in Winnipeg, by an agreement made some years ago. Willie built a store on the lot, at a cost of about $2,500. His wife, according to the evidence, advanced him about $2,000 for this purpose. There is no contest upon the question whether this money was her own separate property, and there is no evidence to contradict Willie's evidence of its actual advance. I think the fair conclusion to be drawn from the evidence is that there was a verbal agreement between Willie and his wife, at the time she made some of the advances making up the $2,000, that she was to have a transfer of the land and the building, whenever she asked for it, as security. At all events, I have no doubt that, after the money was advanced and at a time when it is not shewn that Willie was insolvent, there was a verbal agreement to that effect. It is evident, indeed, that in some way or other Willie and his wife were under the impression that the property was in reality the wife's, because on the 4th September, 1908, she signed a memorandum in the following terms: "Stoney Plain, Sept. 4, 1908. I hereby under-

take to transfer to William Sugarman the store property now occupied by Mr. W. S. Willie in this town, in consideration of that note I indorsed for the said Mr. Willie be returned to me. Property to be returned to me on payment of amount of note with interest." This was signed by Mrs. Willie on its date—I am quite satisfied of this, although, so far as appears, no actual transfer from Willie to her of the property was made until the 8th December. I infer, too, that both Willie and his wife were under the like impression when Mrs. Willie indorsed the note above referred to. I have no recollection of its date being mentioned, but I suppose it must have been two or three months previous to the 4th September.

Having considered the authorities referred to during the course of the argument, I think that, notwithstanding the opinion I have expressed on the evidence, the questioned transaction cannot be sustained, in view of the fact that the actual transfer of the property to Mrs. Willie was made within 60 days of the date of the assignment by Willie for the benefit of his creditors to the plaintiff, though, had it preceded that period, I should have held it valid, on the ground that the circumstances shewed no concurrence of intent either between Willie and his wife or between Mrs. Willie and Sugarman to effect a preference in favour of Mrs. Willie or Sugarman.

Sugarman paid certain sums which were incumbrances against the property. The plaintiff, before action, offered to pay, or take the property subject to the payment of, any such sums, so that the plaintiff is not disentitled to costs.

These items were, it was said, approximately as follows:—

Sept. 23, 1908, paid on account mechanic's lien, claim and costs	$75 17
Dec. 31, 1908, paid Darling bal. of original purchase money and interest	564 40
June 5, 1909, paid mortgage and interest.....	493 53
paid some conveyancing expenses, about	40 00
	$1,226 55

If this amount is not agreed to, I will fix the precise amount upon hearing the parties. The question of interest.

on the one hand, and a charge for use and occupation, on the other, will also have to be dealt with. The precise amount ultimately ascertained will be a charge upon the property in question in favour of the defendant Sugarman.

Sugarman, when he got Mrs. Willie's agreement of the 4th September, 1908, to transfer this property to him, held a note made by Willie, indorsed by Mrs. Willie, which he then gave up to her. He is entitled to be placed in the same position as if he now held that note. So also is Mrs. Willie. They are also each entitled to rank upon the estate as creditors for their respective claims, as the claim would now exist had the questioned transaction not intervened.

In the result, the position will, I fancy, be this. The surplus value of the property arising after satisfaction of Sugarman's charge will form part of the general assets of the estate; Mrs. Willie is at liberty to prove her original claim against the estate; so likewise is Sugarman; Sugarman is entitled to look to Mrs. Willie for payment of any deficiency there may remain after receipt of a final dividend from the estate; and she in turn is entitled to prove this indirect liability against the estate.

As all the parties interested are parties to the action, I think all these questions and any others that may arise incidentally as a result of my present judgment will be best dealt with in this action. The judgment I propose to give is in effect this:—

There will be a declaration that the transaction in question is void as against the plaintiff. There will be a declaration that the defendant Sugarman is entitled to a charge upon the property in respect of sums paid to satisfy incumbrances thereon. If the precise amount is not agreed to or ascertained by me, there will be a reference to ascertain it. The property will be vested in the plaintiff, subject to a charge in favour of the defendant Sugarman for the amount found owing to him on that account. The defendant Sugarman will pay the plaintiff's costs of action against him. I think there was no reason for joining Mrs. Willie as a defendant, and that the plaintiff is not entitled to costs against her, but, on the other hand, should pay any additional costs incurred in the defence of the action by reason of her being joined. The costs payable by Sugarman to the plaintiff may be deducted from the amount of his charge against the property.

What I have said as to costs will apply to the costs only up to and including the judgment which I now direct.

The judgment will reserve for further directions and consideration the questions I have indicated above, with reference to the rights of the respective parties as between each other and as against the estate, and any other questions that may arise, and subsequent costs.

SASKATCHEWAN.

JOHNSTONE, J. DECEMBER 27TH, 1909.

TRIAL.

JAGGER v. TURNER & CO. LIMITED.

Bankruptcy and Insolvency—Assignment for Benefit of Creditors — Action by Assignee to Set aside Transfer of Moneys by Insolvent as Preferential and Void—Evidence —Intent—Knowledge of Insolvency—Correspondence—Recovery of Moneys Transferred.

Action by the assignee for the benefit of creditors of one McConnell to set aside a transfer of moneys by McConnell to the defendants as preferential and void.

W. B. Willoughby, for the plaintiff.

G. E. Taylor, for the defendants.

JOHNSTONE, J.:—The plaintiff is an official assignee under the Assignments Act, and sues as such assignee.

On the 5th February, 1909, one Howard W. McConnell, merchant, of Moose Jaw, carrying on business under the name and style of "McConnell Brothers," being at the time in insolvent circumstances and unable to pay his debts in full, made an assignment of his estate under the said Act to the plaintiff for the benefit of his creditors.

Prior to the 18th January, 1909, one T. J. McCammon, also a merchant of Moose Jaw, became indebted to the said McConnell in a sum exceeding $1,514.39, the purchase price of the business of McConnell Brothers sold to him by the said McConnell, and on the said date McConnell, at the request of

McCammon, signed a document in the following words; "T. J. McCammon, Esquire. Please pay to James Turner & Co. Ltd. the sum of $1,514.39 full of acconnt out of the balance of purchase money due by you to me in payment of the above account less proper reductions. Dated January 18th, 1909."

The amount called for by this order was subsequently paid by McCammon to the defendants, and the plaintiff alleges in the statement of claim that McConnell, on the date referred to, was in insolvent circumstances and unable to pay his debts in full, and, with such knowledge and with intent to give the defendants a preference over his other creditors, signed the said order, and the plaintiff alleged that, as the assignment for the benefit of creditors had been executed within 60 days after the signing of the order in favour of the defendants, the making of the order constituted a fraudulent preference under the Assignments Act, and was void against the plaintiff and the creditors of H. W. McConnell. The plaintiff claimed judgment declaring the order of the 18th January and the payments thereunder to be a fraudulent preference within the Assignments Act and void, and the plaintiff further claimed judgment for the payment of the said moneys by the defendants to the plaintiff, as assignee.

The defendants contended that the order of the 18th January, made by the said Howard W. McConnell, was not a fraudulent preference or made with intent to prefer these defendants, nor had it that effect, nor was it made at a time when McConnell was in insolvent circumstances or unable to pay his debts in full, or knowing that he was on the eve of insolvency, and for these and other reasons did not constitute a fraudulent preference under the said Act.

The trial of the action took place before me at Moose Jaw on the 11th October, 1909, and judgment was reserved.

At the conclusion of the trial I had some doubt as to whether, as against the defendants, there was sufficient evidence of insolvency of McConnell at the time of the giving of the order referred to. I now think, however, the evidence amply sufficient to warrant me in finding that at the time of the giving of the order by McConnell to the defendants, namely, on the 18th January, 1909, McConnell was unable to pay his debts in full and was insolvent, and that the giving of the said order had the effect of giving to the

defendants a preference over the other creditors of McConnell, and I so find.

It was shewn that McConnell was absent from the province at the time of the trial, and that his attendance at the trial to give evidence could not be secured; there was, therefore, no direct evidence as to his insolvency, but his financial condition had to be gathered from his acts and the surroundings.

It appears that McConnell on the 10th April, 1908, purchased from one T. J. McCammon, of Moose Jaw, the person already referred to, all the stock-in-trade, goodwill, etc., of the latter, at and for the price of $10,722, on terms that he McConnell should pay for the same in certain stipulated sums on certain named dates. According to the statement of the brother of H. W. McConnell, who said that he had at one time an interest in the business, and who was employed in the store, and had a knowledge of the financial standing of his brother H. W. McConnell, there was put into the business by the brothers, in all, the sum of $3,000. Calls for money were frequently made upon H. W. McConnell during the fall and winter of 1908, up to the time of his assignment, by McCammon and his other creditors, without avail; the invariable reason for non-payment given by the debtor being his inability to pay, and for which reason McCammon on the 6th January, 1909, obtained from McConnell, who was still indebted to him in a large sum of money, a return by way of sale of all the stock-in-trade of the business carried on by the latter, including goodwill, etc. McConnell, on the 6th January, 1909, and for some time prior thereto, had been unable to pay certain promissory notes given by him to the defendants in payment of goods purchased from them, as well as moneys due to other of his creditors. On several occasions during the months of December, 1908, and January, 1909, McConnell admitted his insolvency, and the official assignee's statement shews the liabilities of McConnell to have been $6,464, as against $2,223.93 assets.

There is no real distinction between being in insolvent circumstances and being unable to pay debts in full. See Dominion Bank v. Brown, 14 O. R. 465. Bertrand v. Canadian Rubber Co., 12 Man. L. R. 27, per Killam, J., at p. 29. In International Bank of Australia v. Morris, [1892] A. C. 287, at p. 290 (a case arising under the provisions of the Insolvency Act, 5 Vict. ch. 17 and amendments, whereby

it was enacted that every payment made by a debtor to his creditor, except in certain cases mentioned, should be a valid payment, provided such creditor should not at the time of payment have known that the debtor was then insolvent), it was said: "If the creditor who receives payment has knowledge of circumstances from which ordinary men of business would conclude that the debtor is unable to meet his liabilities, he knows, within the meaning of the Act, that the debtor is insolvent."

On the 31st December, 1908, a letter was written by McCammon to the defendants (which letter, by the way, was not produced at the trial, nor a press copy thereof obtained, although time was given for its production), from which and the reply thereto, and from subsequent letters and communications between Turner & Co. and McCammon, it must be inferred that the defendants knew perfectly well that McConnell was in insolvent circumstances, or on the eve of insolvency. No other reasonable conclusion could be arrived at. The letter of the 5th January, in reply to that of the 31st December, reads as follows:—

"Hamilton, Jan. 5, '09.

"Mr. T. J. McCammon,

"Moose Jaw, Sask.

"Dear Sir,—

"Re McConnell Brothers.

"Your esteemed favour of 31st ult. reached us yesterday, and, while we regret the state of affairs referred to, we thank you very much for the information given us. Not having received a wire from your good self since, we presume you have failed so far in arranging to purchase the business, and of course if an assignment is made we would be unable to take any steps with regard to protecting ourselves, other than filing our claim in the usual manner with the assignee. They are owing us at present time about $1,500, part of which is overdue, and we are quite willing to leave the matter in your hands to protect our interest as far as possible. Of course if we should receive a wire before hearing further by letter, we will do what we can in way of issuing garnishee proceedings, should a sale of the stock take place to your good self.

"Thanking you again, we are

"yours truly,

"James Turner & Co. Limited,

"per A. G. O."

Again on the 15th January the defendants wrote to McCammon as follows:—

"Hamilton, Jan. 15, 1909.

"Mr. T. J. McCammon,
"Moose Jaw, Sask.

"Dear Sir,—

"Re McConnell Bros.

"Your esteemed favour of 11th inst. reached us this morning, and we also have your telegram dated 14th inst., viz., 'You must act quick if you want protection,' to which we have replied per press copy herewith and now confirm.

"We now enclose statement in full of account with acceptances due 8th and 23nd Oct., 22nd Dec., and 6th Jan. You will see there is one amount to mature on 21st inst., and we have instructed our bank to advise Moose Jaw to hand this over to you if unpaid at maturity.

"We would ask you to hand this statement and vouchers to your solicitor at once with instructions to garnishee money in your hands for purchase of stock from above firm.

"Trusting this matter will have your kind and prompt attention, and thanking you for the interest you have taken on our behalf.

"We are,
"Yours truly,
"James Turner & Co. Limited,
"per A. G. O."

I think this case is entirely distinguishable from that of Newton v. Lilley, 16 Man. L. R. 39, referred to by the defendants' counsel. There it was held, upon the evidence, that the creditor did not know and had not sufficient reason for believing the debtors were unable to meet their liabilities at the time the transaction attacked was entered into, whereas, in the case now under consideration, I hold the contrary. In the Newton case it appeared that the transaction was made between the parties in good faith, and there was no intention on the part of the debtor to give, or the creditor to receive, a preference over the other creditors. In this case I think this intention to prefer was present on the 18th January, as to both the creditor and the debtor.

There will, therefore, be judgment declaring the order in question and the payment thereunder to the defendants, for the reasons above set out, void as against the plaintiff, and the plaintiff will have judgment against the defendants for $1,514.39. The plaintiff to have the costs of the action.

SASKATCHEWAN.

RIMMER, DIST. CT. J. DECEMBER 28TH, 1909.

DISTRICT COURT OF CANNINGTON.

MASSEY HARRIS CO. v. GRAHAM.

Principal and Surety—Release of Surety—Duty of Principal to Realise upon Securities—Conditional Sale Agreements —Duty to Exercise Right of Repossession—Transfer of Securities to Surety.

Action upon "lien notes" for the price of goods sold and delivered.

J. N. Stevenson, for the plaintiffs.

T. J. Lockhart, for the defendant Graham.

The defendant Giffen was not represented, the plaintiffs having discontinued as to him.

RIMMER, DIST. CT. J.:—The plaintiffs' claim is $231.54 and interest on several conditional agreements of sale. The defendant Graham admitted that the goods for which the agreement exhibit A. was given were sold and delivered to him. As to the balance of the claim, the defence is that there was no consideration moving to the defendant Graham; that he signed the 4 lien notes or conditional agreements of sale for the accommodation of the defendant Giffen and as surety only; and that as surety the defendant Graham was released by the plaintiffs giving time to the principal debtor, and by the plaintiffs taking no steps to protect the security, and particularly by not repossessing themselves of the goods. The lien notes, exhibits B., C., D., and E., contained the following provision: "The title, ownership, and right to the possession of the property for which the above note is given shall remain at my own risk in the Massey-Harris Co. Limited, until this note or any renewal thereof is fully paid, with interest, and, if I make default in payment of this or any other note in their favour . . . they may take possession of the property and hold it until this note is paid, or sell the said property at public or private sale, the proceeds thereof

to be applied in reducing the amount unpaid thereon; and the holders thereof, notwithstanding such taking possession or sale, shall have thereafter the right to proceed against me and recover, and I hereby agree to pay the balance due thereon."

Two of the notes came due in October, 1906, the other two in October, 1907, but there was no evidence of a binding agreement between the creditors and the principal for time. The only defence requiring serious consideration is that the creditors had not performed the actual duties devolving on them to protect the security; otherwise it was contended by counsel that the contract imposed on the creditors the active duty of repossessing and reselling the property, and that the creditors had no right of action against the surety until this was done. The only oral evidence was that of the defendant Graham, from which it appeared that he signed the agreements to the knowledge of the plaintiffs' agent as surety, at his request, that the goods were delivered to Giffen, and that the goods had not been seized or sold to him by the plaintiffs. At the close of the defendant's case, the plaintiffs' counsel moved for judgment, stating that he would not adduce any evidence.

Laches amounting to mere omission to do something which the creditor is not legally bound to do, as to sue, does not discharge the surety, but, on the other hand, the neglect of the creditor to perform an active duty to which he is bound for the protection of the security does discharge the surety, and I have recently held in Bell v. Aldrich, on the principle of Watson v. Alcock, 1 W. R. 399, and Wolf v. Jay, 41 L. J. Q. B. 322, that the omission of the seller of goods under conditional agreement to register the writing as required by C. O. 1898 ch. 44, is the omission of an active duty, and that the surety is discharged. The question is: Was there any active duty on the plaintiffs to repossess and resell in order to protect the surety Graham? This is a matter of construction of the agreement for sale, which, so far as I have been able to discover, has not been the subject of direct decisions by our Courts; no authority has been cited to me. The citation of DeColyar, p. 213, to the effect that a creditor need not resort to collateral securities before suing the surety, does not bear on the duty of the creditor to protect the surety. The true question is, what was the contract between the surety and the creditor, and did

that contract impose a duty on the creditor? The surrounding circumstances may be inquired into for the purpose of ascertaining the relation of the parties as creditor, principal, and surety: McDonald v. Whitfield, 8 App. Cas. 745; otherwise the contract, as it appears in the notes sued on, must be construed in the same way as any other contract: Noel v. Proctor, L. R. 2 Ex. 66; and the language used must be given its ordinary and primary meaning, unless the context otherwise requires, or the legal language used requires other interpretation: McGovern v. Bains, [1891] A. C., per Lord Watson, at p. 408.

Looking at the agreements, it appears that the expression used is, "I promise to pay," the legal construction of which, though they are not promissory notes (New Hamburg Manufacturing Co. v. Weisbrod, 4 W. L. R. 125), imports a joint and several liability: Clark v. Blackstock, Holt 474. On the face of the instrument Graham was liable severally for all the agreements and conditions to which Giffen was liable. The evidence of the relation of principal and surety makes Graham's liability only secondary to Giffen's. The law imposes no duty on the plaintiffs to sell before having recourse to Giffen. On the other hand, they are entitled to enforce the promise to pay: per Burton, J.A., in Sawyer v. Pringle, 18 A. R. at p. 227.

I cannot interpret the condition that they shall retake and resell before having recourse to the surety. This would imply a condition precedent to the liability of the surety not recognised by law or the language of the agreement: DeColyar, p. 213. The liability of the surety is, I hold, to pay immediately on default by Giffen, and the surety's right is to have the transfer of any security held by the creditors. In this case the security would be the title and evidence of ownership of the vendors of the chattels.

I do not think that the provisions of sec. 6 of C. O. 1898 ch. 44, prevent an assignment of the right of the vendors of the chattels. It is, I think, the duty of the vendors to protect the security by registration; but I think, also, it is no more his duty to enforce his right of resale than it is the duty of the creditor to sell under the power of sale in a mortgage before recourse to a surety for the mortgage debt. In other words, it is the duty of the creditor to protect the security so that the surety can enforce it. In the present

case I find no evidence for the defendant that the plaintiffs have neglected any active duty which by law or the terms of the contract was imposed on them.

There is judgment for the plaintiffs for $248 and costs.

SASKATCHEWAN.

WETMORE, C.J. DECEMBER 29TH, 1909.

TRIAL.

BROWNSBERGER v. HARVEY.

Sale of Goods—Written Order—Oral Agreement for Return if not Satisfactory after Fair Test—Return and Acceptance by Vendor.

Action upon "lien notes" given for the price of goods sold.

H. V. Bigelow, for the plaintiff.

J. F. Frame, for the defendants.

WETMORE, C.J.:—The defendants purchased from the plaintiff a 10 H. P. Waterous engine, one 28-inch cylinder Premier separator, for $500, and on the 17th September, 1903, they gave two lien notes therefor, one for $300 payable on the 1st December, 1903, the other for $200 payable on the 1st December, 1904, and these notes specified that they were given for the engine and separator above mentioned. The action is brought upon these notes.

The defendants took possession of this property before the order therefor was given or the lien notes signed. The order was in writing, but has been lost, and, when the plaintiff was asked as to its contents, he gave them in a most unsatisfactory manner. There is a good deal of evidence as to what was not in it, but there is practically no evidence to shew what was in it.

The defendants set up that there was a verbal agreement by which the plaintiff agreed to furnish certain repairs and necessary things to make the machinery work properly, and that, if, after being tested, it did not work properly, they would be at liberty to return it and would not be required to pay the price charged for it, which was represented by the notes.

It is quite evident that there was a collateral verbal agreement to the written order, which was recognised as existing by the plaintiff himself.

The plaintiff testified: "I was to furnish repairs to put in running shape. That meant fit for threshing grain . . . that a man could make wages on it." On cross-examination he was asked catagorically whether he had not promised to supply certain specified repairs and parts, some of which he admitted that he had agreed to supply, some of which he denied, and some of which he stated that he did not remember. Those on the list which he denied agreeing to supply were very few. Those with respect to which he did not remember were comparatively numerous. The difficulty is, however, that, while the plaintiff does not remember, the defendants do, and they state specifically what those articles were. Consequently, with the exception of one or two articles so denied by the plaintiff, the defendants' testimony stands uncontradicted in respect to the items that were specified by them as being required when they signed the order for the machine and the notes. The plaintiff testified that the things mentioned, whatever they were, were the things which he agreed to furnish at the time that the order was so signed and the notes given as being necessary to put the machine in running shape.

So far, therefore, as this phase of the case is concerned, there is no difficulty in reaching a conclusion, because the plaintiff has practically admitted it. A great many of the things agreed to be furnished were not furnished. The evidence establishes, to my satisfaction, that the machine did not work satisfactorily. It did not work so as to enable the defendants to make wages by it at all. There was evidence that pointed in the direction that the machine did not work properly, because it was not properly handled, that, after it was returned, it was sold to another person without any further repairs being put upon it, and it worked, for a second rate machine (as this machine was), very satisfactorily. But it certainly did not work properly in the hands of the defendants.

I do not feel called upon in this case to decide whether the reason for the machine not working satisfactorily was because the defendants did not know how to handle it or not, or whether it worked satisfactorily in the hands of the purchaser from the plaintiff, because the weight of evidence

The plaintiff asks for specific performance, or, in the alternative, for a refund of the $600 paid by him on account of the purchase money, but he makes no other claim.

The defendants make no claim for mesne profits, and set up by way of defence that this sum has been forfeited to them under the provisions of the agreement of sale.

In Sawyer-Massey Co. v. Bennett, ante 249, which was decided at the last sittings of the Court en banc, in November, 1909, it was determined, in case of a transfer from the purchaser from the owner of the fee, under an agreement for sale, that, although an action could not be brought by the transferee against the vendor for specific performance, where the purchase money and interest had been paid, the transferees could, in an action by them, as equitable assignees, against the vendor and the purchaser, obtain a judgment declaring the purchaser from the owners in fee simple a trustee for the transferees, the plaintiffs in such action.

Apart from the question of the rights of the plaintiff, because of his default in the payments under the agreement, there was no tender by the plaintiff, and, as Matthews was not his assignee, and for the reason that the agreement between the plaintiff and the vendors had not been produced, and for the further reason that there were executions registered against the plaintiff, to the knowledge of the defendants, in my opinion the defendants were justified in refusing to sign the transfer.

At the time of the tender the plaintiff was in possession of the lands in question, and the contract between him and the defendants had to be cancelled before action could be taken for recovery of the land, and I therefore think that the giving of the notice did not operate as a waiver of any right to take advantage of the default of the plaintiff.

In my opinion, the plaintiff is not entitled to specific performance: Wallace v. Hesslein, 29 S. C. R. 171; Battell v. Hudson's Bay Co., 9 W. L. R. 296.

As to the right of the plaintiff to re-payment of the $600 paid by him on the execution of the agreement for sale, I agree with the conclusion arrived at by my brother Newlands in Hall v. Turnbull, 10 W. L. R. 536. I might also refer to Public Works Commissioner v. Hill, [1906] A. C. 368.

There will, therefore, be judgment for the plaintiff for $600 with the general costs of the action, but no costs of the claim for specific performance.

The defendants will be entitled to the costs occasioned through the claim for specific performance and of the issue thereof. There will be one taxation, and the amount found to be due to the defendants on account of their costs will be deducted from the costs of the plaintiff. The plaintiff to have judgment for $600 and the balance and costs found due on taxation.

MANITOBA.

MATHERS, J. JANUARY 10TH, 1910.

TRIAL.

CANADA FURNITURE CO. v. STEPHENSON.

Guaranty—Joint and Several Contract—Material Alteration in Instrument after Execution by two of four Guarantors —Release of all four Guarantors—Husband and Wife—Wife Executing without Independent Advice—Absence of Explanation—Fraud—Circumstances to put Plaintiffs on Inquiry—Non est Factum.

Action upon a guaranty.

A. E. Hoskin, K.C., and P. J. Montague, for the plaintiffs.

A. J. Andrews, K.C., H. A. Burbidge, C. P. Fullerton, and J. P. Foley, for the several defendants.

MATHERS, J.:—This is an action upon a guaranty given by James Albert Stephenson, his wife, Tina Stephenson, his mother, Margaret Stephenson, and his father, William Stephenson, to the plaintiffs and 4 other creditors. The guaranty is to the creditors and each of them, for the payment by the Stephenson Furniture Co. of the present and future debts of the creditors, or any of them.

The plaintiffs' debt at present amounts to $8,150, and the total debts of the 5 guaranteed creditors amount to between $26,000 and $28,000. James A. Stephenson was the president and managing director of the Stephenson Furniture Co., and Tina Stephenson, his wife, was nominally secretary of the company.

In the early part of the year 1908, the company's indebtedness to the plaintiffs was inconsiderable. In June of that year James A. Stephenson, accompanied by one Moore, went to Toronto to endeavour to make better financial arrangements. They visited the plaintiffs' head office and proposed to give them the guaranty of the present defendants for an increased line of credit. Upon returning to Winnipeg James A. Stephenson forwarded to the plaintiffs the guaranty of himself and wife. The plaintiffs then shipped the company further goods until their claim amounted to about $4,000, but, as their drafts were not met, they ceased shipping. The financial affairs of the Stephenson Furniture Co. were now in a very serious way, and James A. Stephenson and Moore, who was the active manager of the business, endeavoured to induce the defendant William Stephenson to advance money to the company. William had previously assisted the company to some extent. He at first refused, but finally referred them to the defendant Margaret Stephenson, in whose name certain real estate of considerable value stood. They then had an interview with her. She finally agreed to lend the company $10,000, but nothing was said to her about guaranteeing its debts. Her real estate was mortgaged by her to raise this money, William Stephenson acting for her and receiving the proceeds of the loans, but the mortgages were signed by her personally.

This arrangement having been arrived at, the Stephenson Furniture Co. wrote Mr. Shaw, the manager of the plaintiffs at Toronto, notifying him that they proposed to get $13,000 to take up the small debts. Mr. Shaw came to Winnipeg, arriving in the early part of December, 1908, and had various interviews with James A. Stephenson and William Stephenson. The proposition was for Margaret Stephenson to lend the company $10,000, but Mr. Shaw refused to accept this proposition, and insisted that it should be invested in the stock of the company. To William Stephenson's objection that he must have interest on the money and could not afford to do without it, Mr. Shaw proposed that preference stock be issued, and that he should take $10,000 of preference stock, and, as there was some doubt about a dividend being paid, that he should be employed as financial adviser of the company at a salary of $1,200 a year. It was further agreed between the male defendants and Mr. Shaw that all the company's creditors, except the carrying creditors, should be paid off out of

the money so obtained, and that both the past and future debts of these 5 creditors should be guaranteed by the defendants. This arrangement was to some extent carried out at a meeting of the company held on the 14th December, at which meeting the draft agreement of guaranty was read over, and some changes suggested. It was to be re-engrossed and ready for signature the next day. A by-law was passed creating preference shares, and William Stephenson signed, in the name of Margaret Stephenson, an application for $10,000 of such shares.

At that time the guaranty did not contain the name of R. J. Whitla & Co., as one of the carrying creditors, and it was suggested that that firm should be consulted, and their consent to become one of these creditors obtained, in which event their name would be added to the agreement, and their present debt, amounting to about $400, included in the guaranty.

Mr. Shaw, when giving his evidence in chief as the plaintiffs' witness, said that he wrote in the name of R. J. Whitla & Co. in the afternoon of the 15th, after the guaranty had been signed by the defendants Tina Stephenson and James A. Stephenson, and no suggestion that such was not the fact was made until after the evidence for the defence was concluded. James A. Stephenson, when called for the defence, swore that he procured the agreement at the office of the plaintiffs' solicitors on the morning of the 15th; that he took it with him to his office, and afterwards went to his house, about 11 o'clock in the forenoon, and there got his wife's signature to it and signed it himself. He then brought it back, and at a meeting held about 5 o'clock in the afternoon the addition of R. J. Whitla & Co.'s name was made by Shaw, and it was signed by William Stephenson in the name of Margaret Stephenson, per attorney, but not by himself. It is quite evident that William Stephenson executed the document in this way very reluctantly, and after considerable pressure by James A. Stephenson and what amounted to considerable pressure on the part of Shaw.

After the defendants' case had been closed, I permitted Mr. Shaw to be recalled, and he then stated that upon further recollection he remembered he procured the agreement in the solicitor's office in the morning of the 15th; that he went into Mr. Pitblado's private office, Mr. Pitblado not being present; that he there saw the agreement lying on a desk and that he

then wrote in the name R. J. Whitlaw & Co., after which he brought it out and gave it to James A. Stephenson to be taken and signed by his wife. That evidence, given as it was after the importance of his previous statement as to when the signature took place had been brought to his notice, must be accepted with a great deal of caution.

The defences relied upon by the defendants are: first, that the agreement was changed in a material part after it had been signed by Tina Stephenson and James A Stephenson, and therefore all the defendants are discharged; second, as to Tina Stephenson, that she executed it, without understanding its contents or having any explanation of it given to her, at the request of her husband, and without any independent advice, and therefore that she is not bound; third, as to Margaret Stephenson, that she executed the power of attorney under which William Stephenson executed the guaranty in the same way--but, as to her, it is alleged in addition that she was fraudulently deceived and misled as to the nature of the power of attorney she was signing, and that the plaintiffs participated in the fraud, or at least that there were circumstances sufficient to put them upon inquiry. In addition, both the female defendants rely upon the defence of non est factum.

As to the first ground of defence, I find that the name R. J. Whitla & Co. was written in in the manner in which Mr. Shaw swore in the first instance. I cannot accept the explanation which he subsequently gave with so much detail. That fact, I think, unquestionably releases Tina Stephenson from liability, as the addition of a further creditor was undoubtedly a material alteration, as it imposed a further burden upon her.

It is said, however, that it does not release James A. Stephenson, with whose assent the change was made, nor does it release William, who subsequently signed it, knowing that the change had been made, and that it does not release Margaret, because it was made with the knowledge of William, who as her attorney executed it in her name and who did so with knowledge of the alteration. I was at first disposed to accept this view, because it seemed to me that William and James A. must be taken to have known that the change made in the guaranty released Tina, and, knowing that she was released, they executed it as a guaranty of the 3 of them only. A consideration, however, of the decision of a Divisional

Court in Ellesmere Brewing Co. v. Cooper, [1896] 1 Q. B. 75, has led me to a different conclusion. There 4 guarantors had agreed to give a joint and several guaranty for £150, two of them to be liable in £50 each and two for £25 each. After one £50 guarantor and the two £25 guarantors had signed, it was taken to the second guarantor for £50, who signed it, but added after his name the words "for £25 only." It was held that they all were discharged, as that was a material change in the bond. It was argued that the last man to sign was clearly liable for the £25 for which he had intended to bind himself, notwithstanding the change, but the Court held that he had signed as a joint and several guarantor with the others, and, as the others were discharged, so was he.

In this case William Stephenson and Margaret Stephenson signed after the change, and James A. Stephenson is in the same position, as he assented to the change being made. It must be held, as in the Ellesmere case, that those who sig after the change did so as joint and several guarantors with Tina Stephenson, who had signed before the change.

It was argued that this was not a joint and several guaranty, but a several guaranty only. I think, on the wording of the document, it is clearly joint and several. The language is, that the parties of the fourth part (the defendants) "do, and each of them doth, for himself and herself, his and her heirs, executors, administrators, and assigns, guarantee to the said creditors," etc. That is, in my opinion, the language of a joint and several obligation.

What I have said so far is sufficient to dispose of this action, but, as the parties will probably desire to take it further, I think it advisable to deal with the other points raised, in so far as the female defendants alone are concerned.

Counsel for them argued strongly that he could succeed on the defence of non est factum, because Tina Stephenson did not know what the document was she was signing, and Margaret Stephenson was actively misled as to its contents. As to the latter, she knew she was signing a power at attorney conferring certain powers upon her husband William Stephenson. It appears that it contained larger powers than she was led to believe, and which I think she would not have conferred upon her husband. However, she knew the general character of the document; and the fact that it contained larger powers than she supposed does not entitle her

to rely upon the defence of non est factum. The principal case relied upon by the defendants was Foster v. McKinnon, L. R. 4 C. P. 704. That was a plain case where the defendant was induced to indorse a bill of exchange by the acceptor falsely representing to him that it was a guaranty. In that case he indorsed a bill of exchange believing that he was signing a guaranty, an essentially different document.

In Bagot v. Chapman, [1907] 2 Ch. 222, Swinfen-Eady, J., held that a wife who was induced to sign a mortgage on her estate on the representation that is was a power of attorney to enable her husband to deal with the property in the future, was not liable. There, again, the document was of an essentially different character.

The true principle is laid down in the cases of National Co. v. Jackson, 33 Ch. D. 1, and Howetson v. Webb, [1907] 1 Ch. 537, affirmed in appeal, [1908] 1 Ch. 1. In the first of these cases a brother induced his sisters by fraud to execute a deed. They knew it was a deed in some way affecting their property, and it was held that non est factum did not apply. In the latter case a bare trustee of lands was asked to sign a deed re-transferring the property. As a fact one of the documents was a mortgage with covenants. It was held that the mortgage with covenants was not a document so essentially different from a deed as to entitle the defence of non est factum to prevail.

On these authorities I think the defence of non est factum cannot prevail. Neither do I think it can prevail as to Tina Stephenson, because she did not know anything about the document at all.

In the case of the latter, she had, to the knowledge of the plaintiffs, given birth to a child on the 13th December. They knew, therefore, that she would not be in a condition two days afterwards to take much interest in any document that was presented to her for signature. Notwithstanding, they intrusted the document to her husband to get her to sign it. All the information she got was that it was a document he wanted her to sign. She knew it was a document purporting to assist him in some way in his business, and she signed it without asking any questions about it. She says she had the utmost confidence in her husband and was in the habit of signing whatever he asked her to sign.

As to her, the case of Chapman v. Bramwell, [1908] 1 K. B. 233, is very much like the present. There the defend-

ant's husband wanted to buy goods on credit from the plaintiff, who agreed to give him the same on a guaranty of his wife. The plaintiff had a guaranty prepared and sent to him to get her to sign. He took it to her and got her signature, without, as the trial Judge held, sufficient explanation as to its contents, and without her understanding it when she did sign it. The Court of Appeal held that, as she had no conception of the true nature of the document she had signed, and as the plaintiff had left everything to her husband, the plaintiff must take the consequences. The Court, in that case, adopted and approved the language made use of by Lord Lindley in Turnbull v. Duval, [1902] A. C. at p. 434, where he said: "It is in their Lordships' opinion quite clear that Mrs. Duval was pressed by her husband to sign, and did sign, the document, which was very different from what she supposed it to be, and a document of the true nature of which she had no conception. It is impossible to hold that Campbell or Turnbull & Co. are unaffected by such pressure and ignorance. They left everything to Duval, and must take the consequences." That case is also referred to with approval in Howes v. Bishop, [1909] 2 K. B. 390.

On this ground, then, I think the defendant Tina Stephenson is not liable. The plaintiffs, knowing her condition, intrusted the document to her husband to get her signature to it. He took it to her, gave her no explanation whatever of what it was; and they must take the consequences.

As to Margaret Stephenson, her husband had carried on business for a number of years in her name under a power of attorney, which was then in the bank, and which was clearly insufficient to enable him to execute the document sued on. When he executed the agreement on the 15th December, he did so under that power of attorney. When Mr. Shaw noticed that he had signed for his wife per power of attorney, he pointed out that the power of attorney must be produced and examined, and it was taken by James A. Stephenson to Mr. Pitblado, the plaintiffs' solicitor, who pronounced it insufficient, and told him that there must be either a new power of attorney signed or his mother must execute the document herself. James A. Stephenson replied that his mother was ill and that he could not bother her with getting her to sign the document herself, and he says that he told Mr. Pitblado the only way he could get her to sign the

power of attorney would be by representing that it was a renewal of the old power of attorney in the bank. It is denied by Mr. Pitblado that anything of that kind was said. A new general power of attorney, however, was prepared by Mr. Pitblado, one clause of which provided for guaranteeing to any person, firm, or corporation the existing or future debts, obligations, or liabilities of any person, firm, or corporation, and particularly of the Stephenson Furniture Co. When James A. Stephenson went to Mr. Pitblado's office to get the power of attorney for the purpose of having it signed by his mother, he says he noticed the reference to the Stephenson Furniture Co., and he told Mr. Pitblado that, under no circumstances, would his mother sign it in that form, and that the power to guarantee the company's debts must be concealed in some way. Mr. Pitblado says nothing of the kind was said, but that Stephenson, on seeing the reference to the company, asked if the mention of the company's name would not in some way limit the power to guarantee, and Mr. Pitblado replied that he did not think so, but the power of attorney was good enough without it, and struck it out. It is very difficult to believe that a layman such as James A Stephenson, and not a particularly bright one either, would propound such an astute legal question as Mr. Pitblado says he did propound. However, there is no doubt at all that James A. Stephenson did raise some objection to having the name of the Stephenson Furniture Co. mentioned in this document, and that it was entirely re-written with the name of the company left out. There is no doubt either that he did on the evening of the 15th January, 1909, the day on which his mother and father and sister were leaving for the Pacific coast, telephone to his mother's house that the bank had requested that there should be a new power of attorney before his mother went away. He says he telephoned that message to his mother. It turns out that the message was received by his sister, who answered the telephone, and that she delivered it ot her mother, who in turn asked William Stephenson if it were true, and he said it was. That evening about 7 o'clock James A. Stephenson went to his mother's house with the power of attorney handed it to her and said, "Here is the power of attorney to be signed." Believing it to be a renewal of the bank power of attorney, she signed it and delivered it back to James A. Stephenson. The train for the Pacific Coast left about 10 o'clock at night, and a

few minutes before it left Mr. Luke, the local manager of the plaintiffs, James A. Stephenson, and a messenger from Mr. Pitblado's office, went to the railway station, where William Stephenson, Margaret Stephenson, and their daughter, were waiting to take train. They had the guaranty with them, and, after some conversation with all of them together, in which no mention was made of the guaranty or the power of attorney, Mr. Luke and James A Stephenson took William Stephenson into the baggage room, some distance away, and there got him to re-execute the document on behalf of Margaret Stephenson, and also on his own behalf.

To say the least, the circumstances surrounding the execution of that document by Margaret Stephenson are extremely suspicious. She was unquestionably induced to sign by false representation made both by her son and her husband, and it is extremely difficult to believe that the plaintiffs were not aware that some deception was being practised upon her. The objections raised by William and James A. to having a new power of attorney executed, and their insistence that the old one was sufficient; the objection to including the name of the Stephenson Furniture Co. in the power of attorney as first prepared; the fact that a general power of attorney was prepared, whereas the only additional power required was that of guaranteeing, and a power of attorney sufficient for all other purposes was already in existence; the circumstance of her being asked to sign a power of attorney instead of the document itself,, and the further circumstance of her being present at the station when the old man was taken away into another room, and the document there signed under the power of attorney, instead of by herself directly, should at least have aroused in the minds of the plaintiffs a suspicion that some deception was being practised upon her, and put them on inquiry.

In National Co. v. Jackson, 33 Ch. D. 1,. a brother told the plaintiffs that his sisters were not to get any of the proceeds of a mortgage which he produced signed by them. It was held that that circumstance was sufficient to have put them on their inquiry, and that, if they had made inquiries, they would have discovered the fraud and deception practised upon the sisters. If in this case the plaintiffs were not aware that a fraud was being practised upon Margaret Stephenson, I have no hesitation in holding that the circumstances were abundantly sufficient to have put them on their

inquiry, and that, if they had inquired, they would have at once discovered that she was being deceived.

The female defendants also relied upon the lack of independent advice, and urged that, as the plaintiffs had not shewn that they had independent advice, they could not be held liable. The law on the question of whether or not the onus lies upon a person seeking to enforce a security obtained from a wife for the debt of her husband to shew that she had independent advice, is in a very unsettled state. In Stuart v. Bank of Montreal, 41 S. C. R. 516, the Supreme Court of Canada, following Cox v. Adams, 35 S. C. R. 393, have held that the onus does lie upon the creditor. A month or two after that decision the Court of Appeal in England, in Howes v. Bishop, [1909] 2 K.B. 390, decided the very reverse. It is said in Trimble v. Hill, 5 App. Cas. 344, in an appeal from the Supreme Court of New South Wales, that a colonial Court should follow a decision of the Court of Appeal in England in preference to a decision of the Court of the colony. In Hollender v. Ffoulkes, 26 O. R. 61, a Divisional Court in Ontario followed a decision of the Court of Appeal in England rather than the decision of the Ontario Court of Appeal; and in Wood v. Guillette, 10 Man. L. R. 570, Taylor, C.J., followed a decision of the Court of Appeal in England in preference to a prior decision of the Manitoba full Court. In a recent case, however, of Jacobs v. Beaver, 17 O. L. R. 496, Moss, C.J.O., and Osler, J.A., express the opinion that the higher local Court should be followed in preference to the Court of Appeal in England. In Stuart v. Bank of Montreal, supra, Anglin, J., at p. 548, refers to the question and says: "Should the case arise where there was a conflict between the Court of Appeal in England and the Supreme Court, it would be necessary for the Supreme Court to consider what its duty was." In an article in 45 C. L. J. at p. 156, the learned author says that it would be now the duty of the Ontario Courts to follow Howes v. Bishop in preference to the decision of the Supreme Court.

As what I have said on the other points raised is sufficient to dispose of this case, I prefer to express no opinion on this point.

The action will be dismissed as against all the defendants with costs.

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MANITOBA.

MATHERS, J. JANUARY 10TH, 1910.

TRIAL.

BUCHANAN v. CITY OF WINNIPEG.

STEWART v. CITY OF WINNIPEG.

Contract—Erection of Bridge for Municipal Corporation — Contract Declared Forfeit by Engineer—Work Completed by Corporation — Construction of Forfeiture Clause — Right of Contractors to Recoupment of Moneys Expended on Plant and Preparation for Work—Benefit Accruing to Corporation — Indemnity against Loss — Account — Difference between Contract Price and Cost of Completing Work—Acceptance of Bridge—Waiver of Certificate.

Actions to recover sums alleged to be due to the plaintiffs in respect of a contract with the defendants, and for an account, etc.

G. A. Elliott, for the plaintiff Buchanan.

T. R. Ferguson, K.C., for the plaintiff Stewart.

T. A. Hunt and J. Auld, for the defendants.

MATHERS, J.:—On the 2nd October, 1907, the defendants entered into a contract with the plaintiff Buchanan for the construction of a bridge across the Winnipeg river at Lac du Bonnet. Shortly afterwards he took into partnership the plaintiff Stewart, and they proceeded with the execution of the contract. The defendants had under con-

struction at the time a tug and scow for use in building this bridge, and it was one of the conditions that the contractor should take over this tug and scow at the actual cost thereof to the defendants.

Clauses 5 and 15 of the main contract provide for cases where the contractor may make default in performance of the contract—the former for a case where the contract is not being prosecuted with sufficient diligence to satisfy the engineer; and the latter for a case where the contractor fails, omits, or refuses to perform any of the provisions of the agreement which on his part are to be performed; and clause 26, sub-clause (c), of the general conditions attached to the contract, is as follows: " (c) If the works, or any part of them, be not completed at the expiry of the respective periods specified and guaranteed in the contract for completion, or if the contractor assign or sublet his contract without the consent had of the engineer, or if he commit any act of insolvency whatever, or if he permit any execution to be levied on his property, then the engineer may forthwith declare the contract forfeit, and in that case the corporation shall enter into possession of all the works, plant, and materials pertaining to the contract; and the contractor shall be liable for all losses and damage which the corporation may suffer on account of the non-completion of the work by the contractor, and he shall have no claim for payment in respect of the work thereafter performed. In default of other satisfaction for such loss or damage, the plant and materials remaining may be sold (at public auction) for the purpose of reimbursing the corporation. Provided, however, that, should the damage to the corporation resulting from the said default amount to a sum less than that due to the contractor under the contract, or obtained through sale of the contractor's plant as above, then shall the difference become due and payable to the contractor."

Trouble between the partners soon arose, and by the 10th January, 1908, they had reached an impasse. On that date the plaintiff Stewart wrote to the Board of Control and to Mr. Scott, the engineer on the work, that it was impossible to go on. On the 13th January the chief engineer wrote to the plaintiff Stewart that, acting under clause 26 (c) of the general conditions, he declared the contract forfeit. The plaintiff Stewart was placed in charge as foreman for the defendants; the defendants adopted the sub-contracts for the

supply of material made by the contractors, used the plant and material upon the ground, including a sand pit opened by the contractors, the tug and scow before referred to, and completed the contract within the time specified. And the defendants have since taken over and used the bridge.

It was attempted to be shewn that the engineer made a special bargain with the contractors at the time the defendants assumed control of the work, to the effect that they would complete the contract, and, if the cost was less than the contract price, the difference would be paid to the contractors. I cannot find that the engineer assumed in any way to vary the contract or make any new terms. All he did was to tell the contractors that such would be his recommendation to the council. Even if the engineer had assumed to make such an arrangement, in my opinion he had no power to do so.

It was admitted during the argument by counsel for the plaintiffs that, at the time the engineer sent the notice before referred to, conditions existed which entitled him to declare the contract forfeit under sub-clause (c) of clause 26 of the general conditions. It is, however, argued that that provision was only intended as an indemnity to the defendants against any loss that they might sustain by the contractors' default.

It must be taken to have been within the contemplation of the parties that the contractors would have to incur a very considerable preliminary expense before any work at all was done for which they would have a claim against the defendants. The purchase of a tug and scow, the moving of their plant, the making of sub-contracts, the erection of a heating plant for heating the cement and of living camps for their employees and teams, was all work that had to be performed, and the contractors, no doubt, in figuring on the contract, made allowance to cover this preliminary expenditure. When the defendants took possession of the work, they had the advantage of this preliminary outlay, and were thus able to complete the work at an amount less than the face of the contract. They now claim the right to retain for their own benefit this sum, amounting to about $4,000.

The last paragraph of sub-clause (c) is clearly framed to indemnify the defendants against loss. When it speaks of the damage resulting to the corporation from the contractors' default, it means the amount that it will cost the corporation to finish the work over and above the contract price. As an

indemnity against that loss the defendants retain all money payable to the contractors for the work already done by them, and, if that sum is not sufficient to pay the defendants' damage, they may sell the contractors' plant and materials. If, after the defendants have paid themselves for the amount it has been necessary to expend over and above the amount of the contract price, there remains any balance, either of the money payable to the contractors for the work they had already done or for the money received from the sale of their plant and materials, such balance must be paid to the contractors. That is clearly an indemnity to the defendants against loss. But the clause also says that the contractor shall have no claim for payment in respect of the work thereafter performed—that is, for the work performed after the engineer has declared the contract forfeit. Does that mean that the contractor has lost all rights under the contract? I think not. I think that means that he shall not be entitled to be paid for the work done by the defendants thereafter, but does not mean that he has lost all right under the contract. The contract still subsists because both the defendants and the contractors have rights under it that each may enforce against the other after the so-called forfeiture.

It was laid down by the House of Lords in Ranger v. Great Western R. W. Co., 5 H. L. C. 72, that the object of these clauses was to enable the employers to do at the cost of the contractor the work which he had failed, or seemed likely to fail, in doing himself. The amount of the damage was capable of exact measurement. It was the sum which the employer should expend in doing what the contractor should have done, less the amount payable to the contractor. That was the case of a contract for a railway, which provided that in certain events the employer should have power to take possession of the whole, or such parts of the materials, tools, and implements used by the contractor, which the company's engineer might consider requisite for carrying on the works; that the payments then already made to the contractor were to be taken in full satisfaction for all works then already done by him; that all moneys then due or which would thereafter become due to him under the contract, and all tools and materials in and about the works, were to become the absolute property of the employer; and that, if the moneys, tools, and materials so to become the property of the company should be insufficient to cover all

charges occasioned by completing the works, then the contractor was to make good the deficiency. Notwithstanding these stringent provisions, the House of Lords held that, as the damage to the employer was capable of exact measurement, the whole provision was to be regarded as mere machinery for enabling the employer to complete the works at the risk and cost of the contractor, and that the employer was bound to account for the value of the contractor's tools and materials in settling accounts with him, although the employer was justified in seizing and using. The principle of Ranger v. Great Western R. W. Co. covers this case.

By taking advantage of the contractors' preliminary expenditure, including a large sum paid for a tug and scow and for a cement heating plant, the defendants were able to complete the work for less than the contract price. If it had cost the defendants more, they would have the right to sell the contractors' entire plant, and, if there still remained a deficit, to sue the contractors therefor. It cannot be implied that the parties intended that the defendants were to take any profit out of the forfeiture of the contract in this way, although in the event of a loss the contractors would be liable for it.

Section 15 of the principal contract makes provision in certain events for the defendants cancelling and annulling the contract, and for determining the rights of the parties thereafter. This is a much more stringent provision than 26 (c) of the general conditions, and, if the defendants had proceeded under it, it is at least doubtful if the contractors would have any right to an account. It is admitted, however, that the defendants did not cancel the contract under that provision. Something may be inferred, I think, from the inclusion of such a stringent provision in the paragraph which provides for the defendants, as a corporation, acting, and its omission from another paragraph which provides for the engineer acting on his own initiative. Viewing the whole contract and the circumstances surrounding it, I am of opinion that the plaintiffs are entitled to have the defendants account for the difference between the cost of the defendants completing the work and the contract price.

It was objected that the contract provides for payment by the defendants only on the engineer's certificate being given. Even if these provisions of the contract are applicable, where the defendants have taken over the work and completed it themselves, it was shewn that the defendants have

taken over and are using the bridge as a completed work. Under the circumstances, I think the defendants have waived their right to rely upon this provision.

There will be judgment referring it to the Master to take an account of the costs and expenses incurred by the defendants in completing the work, and directing that the balance, if any, shewn by such accounts, be paid into Court for the use of the parties shewn to be entitled to it.

The plaintiffs are entitled to the costs of the actions up to and including the trial.

Further directions and costs of the reference are reserved.

MANITOBA.

MACDONALD, J. JANUARY 10TH, 1910.

CHAMBERS.

RE NORTHERN CONSTRUCTIONS LIMITED.

Company—Winding-up—Contributories—Shares Appearing to be Paid in Part—Onus on Shareholders to Shew Payment in Full — Transfer of Goodwill Asset — Agreement to Release from Liability — Power of Company — Promotion Shares — Dividend Paid when Company Insolvent—Application to Payment of Shares—Illegality.

Application by the liquidator to place certain names on the list of contributories of the company, in course of winding-up.

E. Anderson, K.C., for the liquidator.

E. F. Haffner, for creditors.

G. W. Jameson, J. R. Higgins, and W. Manahan, for the alleged contributories.

MACDONALD, J.:—The company was incorporated on the 25th June, 1906, and winding-up proceedings were taken in December, 1907.

It is sought by the liquidator to place on the list of contributories the names of Eustace Estling, John J. Borebank,

and William Ramage, and, these persons denying liability, an issue has been directed, in which they may be properly called the defendants, and the question to be tried is whether or not these defendants or any of them, are liable to be placed upon the list of contributories, and, if so, for what amount are they liable.

These defendants were three of the incorporators and three of the first directors, each subscribing the amount of stock set opposite their respective names in the petition for incorporation as follows:—

Eustace S. Estling, $4,000; amount paid thereon, $250; how paid, cash.

William Ramage, $3,000; amount paid thereon, $1,000; how paid, cash.

John J. Borebank, $3,000; amount paid thereon, $1,000; how paid, cash.

The onus is on the defendants to shew that the balance appearing as unpaid has been paid. Have they met the onus?

The defendant Estling contends that $3,000 of the stock originally subscribed by him was paid for by a goodwill asset, which he claims to have transferred to the company, but all that the petition for incorporation shews to have been paid is $250, and, if it was intended that this $3,000 was to be paid in this way, it should have so stated in the petition: Manitoba Joint Stock Companies Act, sec 7 (a).

Pursuant to the requirements of this Act, the company made returns (exhibit 5), and deposited the same in the Department of the Provincial Secretary on the 1st February, 1907, and these returns were verified by the affidavit of Borebank, the president, and Estling, the secretary, of the company, and purport to shew the list of shareholders, the amount of stock held by them, and the amount unpaid thereon, and this shews the defendants holders of the amount of stock and amounts unpaid thereon as follows:—

E. S. Estling, $4,000; unpaid thereon, $750.

J. J. Borebank, $8,000; unpaid thereon, $1,750.

W. Ramage, $3,000; unpaid thereon, $500.

And further declares that none of such stock is free from call.

The defendant Estling claims payment of $3,000 under agreement with the promoters of the company (exhibit 7, p. 5) in consideration of his services in promoting the com-

pany and goodwill and business turned over to the company; but, according to his own evidence, this agreement was abandoned by his consent and that of the company and its promoters. How then can he be exempt from liability for these 30 shares?

"Those persons who are named in the charter of a company as shareholders are liable for the stock stated in the charter to be held by them, and no further act of the directors is necessary:" In re Haggert Bros. Mfg. Co., 19 A. R. 582.

In the charter incorporating this company the defendant Estling is named as the holder of stock to the amount of $4,000, with $250 paid thereon, and as to the $3,000 for the 30 shares referred to he is not entitled to any credit.

The company cannot, under such conditions as exist here, enter into an agreement to release him from his liability to pay for his shares in cash: Re Jones and Moore Electric Co. of Manitoba, 18 Man. L. R. 549, 7 W. L. R. 527.

On the 17th May, 1906, being shortly prior to the incorporation, the promoters entered into an agreement (exhibit 7) by which certain fully paid up shares were to be allotted amongst them, 30 of which shares were to be allotted to the defendant Estling. These are the 30 shares referred to as those to which he now claims to have originally subscribed. In his examination on discovery he says: "I object to issue of bonus stock, because I had something to do with it before;" and in cross-examination he says that was the reason the agreement was ignored. "Some time after the incorporation of the company, the arrangement was made by which I was to get paid up stock." And he received 100 shares, 20 of which he assigned to each of the defendants Ramage and Borebank, being the number to which they were to be entitled on the agreement of 17th May, 1906 (exhibit 7), a number to the other promoters, leaving himself the 30 shares originally intended for him. This was simply an allotment of promotion stock under another name, and in a manner evidently to protect against the very trouble which has now become a reality. The defendant Estling says: "I objected to promotion stock, and thought this the better way of doing it."

In 1907 a balance sheet (exhibit 19) was made out by the defendant Ramage, shewing net profits to the company up

to the 28th February, 1907, of $9,988.44, on the strength of which the company declared a dividend apportioning the sum of $9,000 amongst the shareholders by applying it on the unpaid balance on their shares, thus paying for their shares in full.

Section 32 of the Manitoba Joint Stock Companies Act provides that "the directors of the company shall not declare or pay any dividend when the company is insolvent, or any dividend the payment of which renders the company insolvent or diminishes the capital stock thereof," &c.

This balance sheet appears to me to have been made out to suit the dividend necessary to pay for shares in full rather than as representing truly the condition of the company. At the time this was made out, the company was hopelessly insolvent, and, I must hold, to the knowledge of the directors, and there was no justification for the declaring of this dividend, and it cannot be allowed to stand. The directors must have known of the company's position with St. Paul's Presbyterian Church at the time it declared this dividend, and at the time the balance sheet referred to was made out shewing a profit on this contract to that date of $2,400, whereas a heavy loss was staring them in the face.

The 20 shares issued to each of the defendants Borebank and Ramage must be held to be promotion stock. They accepted it with the full knowledge of all surrounding circumstances, and are not in the position of bona fide purchasers of paid up stock, and are subject to the same liability for calls as their transferor: Re Manes Tailoring Co., 11 O. W. R. 498. The defendants, I hold, must be placed upon the list of contributories and liable as follows:—

Estling for 40 shares, upon which $250 has been paid, leaving a balance for which he is liable of $3,750.

Borebank for 50 shares, upon which $1,000 has been paid, leaving a balance for which he is liable of $4,000.

Ramage for 50 shares, upon which $1,000 has been paid, leaving a balance for which he is liable of $4,000.

Costs against the defendants.

MANITOBA.

JANUARY 17TH, 1910.

COURT OF APPEAL.

SHAW v. CITY OF WINNIPEG.

Municipal Corporations—Water Works Department—Liability for Negligence of Servant—Injury to Plaintiff by Reason of Servant Leaving Trap-door in Dwelling-house Open—Corporation Acting in Local or Private Capacity—Husband and Wife—Injury to Wife—Action for Damages—Parties.

The statement of claim was as follows—

1. The plaintiff William Shaw is a foreman, residing at 745 Logan avenue, in the city of Winnipeg, and the plaintiff Isabella Shaw is his wife. The defendants are a municipal corporation, incorporated under special charter by the legislature of the province of Manitoba.

2. On or about the 24th June, 1909, the plaintiff Isabella Shaw received injuries through falling through an open trap-door in the floor of the kitchen at her residence, No. 745 Logan avenue aforesaid, whereby she sustained a fracture of the right leg, above the knee.

3. The plaintiff Isabella Shaw has been since the 24th June and is now suffering from said injuries, and is now confined in the Winnipeg general hospital, under treatment for the injuries she received as aforesaid.

4. The plaintiff Isabella Shaw alleges, as the fact is, that the said injuries were caused to her by reason of the negligence of one William Rutherford, a person in the employ of the defendant corporation, as an official of the city waterworks department, whilst in the performance of his duty as such employee of the defendant corporation.

5. The plaintiff Isabella Shaw alleges further that on the said 24th June, in the afternoon, the said William Rutherford, in the course of his duty as an official of the said department, called at the residence of the plaintiffs for the purpose of reading and inspecting the water meter of the city of Winnipeg, through which water was supplied to the said

premises, which was situate in the basement or cellar of the said residence. For the purpose of examining the said water meter, the said William Rutherford opened the trap-door in the floor of the kitchen of the said residence for the purpose of obtaining access to the said basement and for reading the meter therein situate, and the plaintiffs allege that the said William Rutherford negligently left the said residence, after having performed his duty as aforesaid, leaving the said trap-door open.

6. By reason of its situation in the floor of the plaintiffs' residence, the said William Rutherford had occasion to know and did know that the said trap-door, if left open, would be dangerous to the persons occuping the plaintiffs' house, and the plaintiff Isabella Shaw in particular.

7. The plaintiff Isabella Shaw, not knowing that the said trap-door had been left open by the said William Rutherford, and while exercising due caution, inadvertently stepped through the said trap-door and fell with violence to the floor of the basement or cellar, sustaining the injuries aforesaid.

Paragraphs 8 and 9 stated the extent of the damage and loss suffered by the plaintiffs as a result of the facts alleged in the first 7 paragraphs, and the 10th paragraph was a claim for damages and costs.

To this statement of claim the defendants demurred.

METCALFE, J., overruled the demurrer, and the defendants appealed.

The appeal was heard by RICHARDS, PERDUE, and CAMERON, JJ.A.

T. A. Hunt, for the defendants.

R. M. Dennistoun, K.C., and J. R. Young, for the plaintiffs.

RICHARDS, J.A.:—This case is distinctly different from those where the claims arise from acts of servants of a municipal corporation who are carrying out governmental powers committed by the legislature to the corporation. The defendants, in pursuance of powers in their charter, have voluntarily undertaken the business of supplying water to residents of the city, and have established a waterworks system for that purpose. In doing this they have brought themselves into the position of a private business corporation, or, at least, of a

semi-public one. It is alleged that the profits, if any, from the work, go back to the defendants, and, in that way, to the benefit of the citizens; but I am unable to see what difference that makes as to the question of the defendants' liability for the acts of their servants, employed in connection with such waterworks system. The statement of claim shews that Rutherford was acting as the defendants' servant in examining the water meter, and in opening the trap-door in the floor for the purpose of getting access to the water meter.

It is apparent to every person that the leaving open of a trap-door, in the way alleged in the pleading, is dangerous negligence, and such as is liable to cause such an injury as that complained of. It seems to me that there was a duty cast upon the defendants, acting by their servant Rutherford, to put an end to that danger by closing the trap-door as soon as he had made the examination of the meter and had left the cellar. I do not mean to imply by the above that he was at liberty to leave the trap-door open while he was examining the meter. Whether doing that would or would not be negligence, might depend upon circumstances not stated in the pleading, but his leaving it open when he left the house was undoubtedly, in my opinion, negligence.

The case of Hesketh v. City of Toronto, 25 A. R. 449, is, I think, distinctly in point. There the municipal corporation were not bound to establish and manage a fire department; but they had done so, and, an injury having been caused by the negligence of their servants employed by them in connection with such fire department, while in the performance of their duties as such servants, the corporation were held to be liable.

That is precisely the case here. The defendants were not bound by their charter, or by any statute, to establish the waterworks, but, having established them, though for the benefit of the city, and though essential to the sanitary and other purposes of the city, they are liable for the acts of their servants as any other corporation.

At p. 450, in Hesketh v. City of Toronto, Chief Justice Burton distinguishes the question of liability for acts done by their servants under powers of legislation and regulation granted to a municipal corporation, and points out that no action is maintainable against the corporation for such acts unless specially given by statute. He adds to that: "But if the legislature, in addition to these powers, had chosen to

confer upon them power to carry on gas or waterworks for private gain, these powers would be regarded as entirely distinct and separate from those appertaining to the defendants as a municipal body, and quoad such powers and their exercise they would be regarded as a private company and subject to the responsibilities attaching to that class of institutions. In other words, whilst no private action would lie against a municipal corporation for damages sustained by reason of their neglect to perform a public duty, they would be civilly liable for damages resulting from acts done in what is sometimes called their private character; that is, in the management of property and rights which they have voluntarily assumed for their own advantage or profit as a corporation, although enuring ultimately to the benefit of their citizens."

Mr. Justice Osler, at p. 456, says: "The council are not bound to maintain a fire department, or to assume the duties of managing one as part of the work of the corporation. Neither are they bound to construct and establish sewers, or water or gas works. But, if they do, it is clear that the law imposes upon them the obligation to use reasonable care that no unnecessary damage be done. I do not see how they are in a different position in regard to their fire department. They have chosen to create it by by-law and to provide for the carrying it on by themselves through the medium of a committee of their council and of officers and servants appointed by themselves or the committee. . . . The fact that the work is undertaken by them for public convenience, and not for profit, makes, as I have said, no difference. If they volunteer to undertake it, they are bound to see that they do not, by the negligent acts of their servants, inflict injury upon those whose situation calls for the exercise of reasonable care."

Gilbert v. Trinity House, 17 Q. B. D. 795, appears to me also to uphold the above principle.

In Garbutt v. City of Winnipeg, 18 Man. L. R. 345, 9 W. L. R. 550, a polling booth was established by the council for the purpose of receiving votes on money by-laws. The plaintiff entered the polling booth to vote on the by-laws, and there received injuries caused by defects in the apartment provided for marking ballots. It was held that an action lay against the city for compensation for such injuries. The Chief Justice, in delivering judgment, said: "If the defendants are liable in this case, it is on the principle of respondeat superior. If the plaintiff had been injured simply

because of neglect of some official in preparing booths to take the votes for the election of aldermen, then I think the official would have been acting in a public capacity, and the law of respondeat superior would not apply. . . . The electors were, however, called upon to vote for or against a by-law to permit the borrowing of money for what might be termed the local, or private, purposes of the city. . . . In preparing the compartment for marking the ballots a dangerous part of the building was selected."

I think the present case comes directly within the law where the corporation are acting in their local or private capacity.

In my opinion, the statement of claim is sufficient on its face. I would dismiss the appeal with costs to be costs in the cause to the plaintiffs in any event.

PERDUE, J.A.:—This is an appeal from an order made by Metcalfe, J., overruling a demurrer by the defendants to the statement of claim.

The action is brought by William Shaw and Isabella Shaw, his wife, to recover damages alleged to have been caused to the latter by the negligence of one Rutherford, a person in the employ of the defendants as an official of the city waterworks department. Rutherford, it is alleged, entered the residence of the plaintiffs for the purpose of reading and inspecting the water meter. The meter was kept in the cellar, which was reached by a trap-door in the floor of the kitchen. Rutherford opened the trap-door, went into the cellar, and, after he had examined the meter, came away, negligently leaving the trap-door open behind him The plaintiff Isabella Shaw, not knowing that the trap-door was open, and while exercising, as is alleged, due caution, fell through it and was severely injured.

If, instead of being a municipal corporation, the defendants were an ordinary company incorporated for the purpose of supplying water to the citizens of Winnipeg and having the powers contained in secs. 873 to 930 of the Winnipeg charter, there could be no doubt as to their liability for the negligence of their servant, in the circumstances set forth in the statement of claim. A master is "considered as bound to guarantee third persons against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business:" per Lord Cranworth in Bartons-

hill Coal Co. v. Reid, 3 Macq. 109; and this even, as in that case, where the master is a corporation.

The law is thus stated by Lord Blackburn in Williams v. Jones, 3 H. & C. 609: "Now, the general rule is clear, that where the relation of master and servant exists between one directing a thing to be done and those employed to do it, the master is considered in law to do it himself, and as a consequence that the master is responsible, not only for the consequences of the thing which he directed to be done, but also for the consequences of any negligence of his servants in the course of the employment, though the master was no party to such negligence and even did his best to prevent it." See also Malcolm v. McNichol, 16 Man. L. R. 411, 39 S. C. R. 265.

The contention on behalf of the defendants is that, they being a municipal corporation, the negligence set out in the pleading was an omission or nonfeasance simply, for which they are not liable either at common law or by statute.

Under their charter, the City of Winnipeg are empowered to design, construct, build, purchase, improve, hold, and generally maintain, manage, and conduct waterworks and all matters, machinery, and appliances therewith connected or necessary thereto, in the city (sec. 873). All such waterworks, pipes, erections, and machinery requisite for the undertaking are vested in and are the property of the city (sec. 878). Power is given to the city to levy and collect rates for the supply of water to owners or occupants of houses, tenements, or lots (sec. 883). These rates when collected shall be paid to the city treasurer (sec. 884); and the revenues arising from the supplying of water shall, after providing for the expenses attendant upon the maintenance of the works, form part of the general funds of the city (sec. 905). The construction and operation of the waterworks system were not compulsorily imposed by law upon the corporation. They were empowered by law to construct or acquire waterworks, and, in pursuance of this, they voluntarily constructed or acquired the present system. One of their objects in so doing was to make profits, or, at all events, to earn and collect fees or rates for supplying water to the inhabitants of the city. Their obligations and liabilities in respect of streets, bridges, and highways are imposed by statute, and in performing them they act as a public body without emolument. The cases cited by the counsel for

the defendants respecting nonfeasance or misfeasance, govern the immunities or liabilities of municipal corporations engaged in performing the ordinary public functions of such corporations for the general welfare of the people of the municipality, and do not deal with the duties and liabilities of such corporations while carrying on a quasi-private enterprise, either wholly or partly for profit.

In Scott v. Mayor, &c., of Manchester, 2 H. & N. 204, the defendants, a municipal corporation, were empowered by Act of Parliament to construct gas works and supply and sell gas and dispose of the coke, the surplus profits to go to reducing the water rates and otherwise towards the improvement of the town. The defendants were held liable for injuries caused to the plaintiff by the negligent conduct of workmen employed to lay down the pipes whereby a piece of metal was projected against him. Cockburn, C.J., in giving judgment in the Exchequer Chamber, said that the reason of the decision was that "the corporation and township derive a profit from the carrying on of the works," or, as he afterwards said, "the defendants were thus in the nature of a trading corporation;" Coe v. Wise, 5 B. & S. 440, 475.

In Cowley v. Mayor, &c., of Sunderland, 6 H. & N. 565, the defendants, a municipal corporation, had erected public baths and wash-houses under the provisions of an Act of Parliament. While the plaintiff, who had paid for permission to wash, was using a wringing machine, which was part of the machinery provided, a projecting rod which had been negligently allowed to remain attached to the revolving cylinder, caught in the plaintiff's gown, dragged her to the machinery, and injured her severely. It was held that the defendants were liable. In giving the judgment of the Court, Wilde, B., said: "It is sufficient to say, that in our opinion, the legislature did not intend to withdraw from the corporation to whom the wash-houses belonged, the responsibility which might attach to any improper construction or management of them."

In Paterson v. Mayor, &c., of Blackburn, 9 Times L. R. 55, the defendants, who were operating gas works, were held liable for injuries caused by an explosion of gas which took place owing to the negligent manner in which the defendants' workmen cut the connection from the gas main to the plaintiff's meter.

In a Canadian case, Mayor, &c., of St. John v. Macdonald, 14 S. C. R. 1, a ferry across the St John harbour was under the control and management of the corporation of St. John, who charged tolls for the use of the ferry. The plaintiff, who had come by railway, went upon the ferry, his toll being paid by a coupon attached to his railway ticket, which coupon the defendants detached. On arriving at the opposite side of the harbour, one of the deck-hands took down the guard-chain. The plaintiff and other passengers, thinking this was an invitation to land, attempted to do so, when the plaintiff fell between the boat and the floats and was injured. It was held that the corporation were liable for the injuries caused by the negligence of their servants.

In this connection I would also refer to Mersey Docks Trustees v. Gibbs, L. R. 1 H. L. 93. The members of the town council of Liverpool and their successors were formed into a corporation by the style of "The Trustees of the Liverpool Docks." The trustees were empowered by statute to make and maintain docks and warehouses, which were open to the use of the public paying rates for their use. A ship was injured by the negligence of the trustees in allowing mud to accumulate at one of the docks. It was held that the principle on which a private person, or a company, is liable for damages by the neglect of servants, applies to a corporation which has been intrusted by statute to perform certain works and to receive tolls for the use of those works. Lord Blackburn, in giving the opinion of the consulted Judges, stated the proper canon of construction to be that, "in the absence of something to shew a contrary intention, the legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same thing." The rule thus enunciated was approved by the House of Lords. Where, therefore, the legislature authorises a municipal corporation to construct and operate a system of waterworks for profit, it in effect makes them, in so far as these powers and functions are concerned, a waterworks company, and, in the absence of any provision to the contrary, subject to the liability for negligence which the general law imposed.

In the United States the summary of the law as to the responsibility of a municipal corporation operating a sys-

tem of waterworks is thus expressed in the Cyclopædia of Law and Procedure, vol. 28, p. 1287: "Under a legislative delegation to a municipality of a mere power to supply itself with water for fire and domestic uses, the supplying of water is a discretionary function. Whenever voluntarily undertaken, if profit is the object or effect of the undertaking, either in whole or in part, it becomes a quasi-private business, and the municipality is quoad hoc subject to the same rules of liability as water companies." Cases are there cited which support that statement of the law.

In Hesketh v. City of Toronto, 25 A. R. 449, it was held that, although a municipal corporation is not bound by law to establish and manage a fire department, yet, if it does so, it is liable for injuries caused by the negligence of the servants employed while in the performance of their duties. Distinction is drawn in that case between the liability of a municipal corporation when acting as a public body and performing merely public functions and the liability of such corporation when carrying on gas or waterworks for private gain. In the latter case the corporation, quoad such operations, is to be regarded as a private company and subject to the responsibilities attaching thereto.

The same distinction is also pointed out by Howell, C.J.A., in Garbutt v. City of Winnipeg, 18 Man. L. R. 354, 346.

By sec. 895 of the city charter, the city and their authorised servants are empowered to enter all parts of a building in which water is delivered, for the purpose, amongst other things, of inspecting the water meters. This is necessary for the purpose of reading the meter so as to ascertain the quantity of water that has been used by the customer and to make up the amount of the bill. Rutherford, who is in the defendants' employ, entered the plaintiff's premises to read and inspect the water meter. It was his duty and the duty of the city to make this entry and perform the inspection without doing any unnecessary injury or committing any nuisance. It was his duty and that of his employers to leave the premises as he had found them. Instead of so doing, it is alleged that he negligently left open a trap-door in the floor of the kitchen so that the plaintiff Isabella Shaw, while exercising due caution, fell through the open trap-door and sustained the injury complained of. I think that, in view of the authorities I have referred to, a good cause of action is disclosed in the statement of claim.

An objection was taken by the defendants that Isabella Shaw, the person injured and the wife of her co-plaintiff, William Shaw, had no cause of action. I think the wife, as the person injured, had a cause of action and was properly joined as a plaintiff. The cause of action does not depend upon contract, but is an action for negligence whereby she, being the wife of the occupant and resident on the premises, sustained injury. See Beven on Negligence, 3rd ed., pp. 449-450.

The appeal should be dismissed with costs.

CAMERON, J.A., concurred.

MANITOBA.

JANUARY 17TH, 1910.

COURT OF APPEAL.

MACKENZIE v. NEWMAN.

Contract—Services of Physician to Servants of Defendants—Payment according to number of Men Employed—Computation—Evidence—Average.

County Court appeal.

The defendants had gangs of workmen in the bush, and employed a physician, named Gordon Malcolm, to attend their workmen, they giving him 75c. per month for each man in their employ. Dr. Malcolm did the work except for the last two months. With the defendants' knowledge, he obtained from their books a statement of the number of men in their employ during certain months for which he was unpaid, including the two months for which he failed to give his services, and assigned his claim thereon to the plaintiff, who sued for the same.

When the case came on for trial this statement was put in evidence. The defendants went to trial without any search of their own books to see whether the statement was correct or not, and, in reduction of the amount claimed, gave evidence that for the last two months of the period

Dr. Malcolm had not performed the services in question. They did not go prepared with a statement of the number of men in their employ during those two months, and the only evidence as to that before the trial Judge was a statement, made by one of their employees, that, in his opinion, the average number of men working during those two months, was 50. The trial Judge held that Dr. Malcolm had performed the services except for those two months, and the evidence bore him out in so holding. He, however, deducted from the plaintiff's claim what would be the amount payable in respect of 50 men for each of the last two months, and gave judgment for the balance.

The defendants appealed, contending, amongst other things, that the trial Judge should have held the case open until they brought in their pay-rolls to shew how many men actually were in their employ during the two months.

The appeal was heard by RICHARDS, PERDUE, and CAMERON, JJ.A.

H. P. Blackwood, for the defendants.

R. A. C. Manning, for the plaintiff.

RICHARDS, J.A.:—It appears that, if a man stayed 4 days in the defendants' employ, the doctor would be entitled to a month's pay in respect of that man, and, as the number of men at work kept shifting a great deal during the two months in question, the claim was that, if there were only an average of 50 working, there might in fact be double, or more than double, that number in respect of whom, if the doctor had attended, he would be entitled to fees.

It was argued that the statement covered all floating cases of that kind, and that the learned trial Judge, by only allowing for the average number of men during these months in his deduction, necessarily deducted for fewer persons than he should.

As the defendants made it part of their case that the plaintiff was claiming wrongfully in respect of men who had worked during those two months, and as they knew that this statement from the defendants' books had been got, which the plaintiff put in evidence, it seems to me that it was their duty to go to trial prepared with evidence to shew the number of men in respect of whom deduction should be made, and that, they not having done so, the learned trial

Judge was justified in deducting only such a number as the defendants' own employee stated were, on the average, working during these months at any one time.

In my opinion, the appeal should be dismissed with costs.

PERDUE, J.A.:—I see no ground for interfering with the decision of the County Court Judge. I think the appeal should be dismissed with costs.

CAMERON, J.A., concurred.

MANITOBA.

JANUARY 17TH, 1910.

COURT OF APPEAL.

RE SOMERVILLE.

County Courts—Territorial Jurisdiction—Judicial Districts and Divisions—County Courts Act — Order of County Court Judge Quashing License—Situation of Licensed Premises—Liquor License Act, sec. 19—Certiorari.

On the 14th October, 1909, MICKLE, County Court Judge of the Northern Judicial District, made an order, under sec. 119 of the Liquor License Act, R. S. M. 1902 ch. 101, quashing an hotel license issued by the license commissioners for district No. 1, to one G. B. Somerville.

The applicant for the license made a motion to the Court of Appeal for a writ of certiorari for the purpose of quashing the order, on the ground of want of jurisdiction. It was agreed that the merits should be determined upon the argument of the motion for the issue of the certiorari.

The application was heard by RICHARDS, PERDUE, and CAMERON, JJ.A.

A. J. Andrews, K.C., and F. M. Burbidge, for the applicant.

E. L. Taylor, K.C., contra.

The judgment of the Court was delivered by

PERDUE, J.A.:—The premises in respect of which the license is sought are at Rivers, in township 12, range 21, west. It is contended by the applicant that Rivers is not in the Northern Judicial District, and that consequently the County Court Judge of that district has no jurisdiction.

Township 12 in range 21 west is comprised in the County Court Judicial Division of Rapid City. The sittings of that Court are held at Rapid City. It is admitted, however, that this township is not in the Northern Judicial District. That district was formed in the year 1908, by an amendment to the Municipal Boundaries Act, being 7 & 8 Edw. VII. ch. 42, sec. 2. The southern boundary of the district cuts through the County Court Division of Rapid City, leaving three townships of it in the Western Judicial District, one of these being the above-mentioned township 12. The question, therefore, is, has the Judge of the Northern Judicial District jurisdiction throughout the whole of the Rapid City Division, or is his jurisdiction confined to the portion of it that lies in the Northern Judicial District?

By the County Courts Act, R. S. M. 1902 ch. 38, the existing County Courts and the Judicial Divisions for which they were constituted respectively, are continued until changed under the provisions of the Act (sec.3). The Lieutenant-Governor in council may, by order in council, alter the limits of Judicial Divisions from time to time (sec. 4). A Judicial Division is defined by sec. 2 (k) as including such territory as is now, or may hereafter be, assigned to any County Court. A Judicial District is defined by R. S. M. 1902 ch. 89, sec. 8 (aa), as "a District for judicial purposes." By sec. 9 of the County Courts Act, there shall be for each County Court Division or Judicial District, a County Court Judge. A County Court Division is a portion of a Judicial District set apart, under the Act, for one or more Judges to exercise jurisdiction over (sec. 2 (1)). By sec. 10, each County Court shall be presided over by the County Court Judge appointed for the Judicial District, or for any Division of a Judicial District for County Court purposes within whose District or Division such County Court may be situate. There is only one County Court Judge appointed for the whole Northern Judicial District, there being no subdivision of the District into County Court Divisions for judicial pur

poses. By sec. 17, an oath of office is to be taken by each County Court Judge before he enters upon the duties of his office. This oath is as follows: "I ..... do swear that I will truly and faithfully, according to my skill and knowledge, execute the several duties, powers, and trusts of a Judge of the County Courts of the ..... Judicial District (or County Court Division, as the case may be) without fear, favour, or malice."

It is clear, from the foregoing, that the County Court Judge is appointed for the territory included in the Judicial District or County Court Division of Judicial District, and that he is not appointed as the Judge of any particular group of Judicial Divisions for County Court purposes.

Provision is made in the Act permitting the Judge of any Judicial District, at the request in writing of the Judge of another Judicial District, to relieve the latter and perform his duties for him. No such request was made in the present case.

Unfortunately no order in council was passed when the Act creating the Northern Judicial District came into force, adding the three townships above mentioned to the adjoining Judicial Division in the Western Judicial District. Although these townships are, by force of sec. 3 of the County Courts Act, still part of the Rapid City Judicial Division, the Judge of the Northern Judicial District, who presides over the County Court at Rapid City, has no jurisdiction in respect of them, as they lie outside his Judicial District. They come within the jurisdiction of the County Court Judge of the Western Judicial District, although they are not attached to any of the Judicial Divisions in the last-named Judicial District.

Under sec. 19 of the Liquor License Act, power is given to the County Court Judge within whose jurisdiction the licensed premises lie, on the complaint of any person that a license, has been improperly obtained, to direct the license commissioners to cancel the same, should it appear to him that the same has been obtained by fraud or in an improper manner. If, therefore, the licensed premises lie outside his Judicial District, the Judge has no jurisdiction under the section. By the same section the complaint is to be lodged with the County Court clerk of the Judicial Division wherein the licensed premises are situated. The complaint in the present case would, therefore, have to be lodged with the

clerk of the County Court at Rapid City, although the Judge of the Northern Judicial District would have no power to entertain the application, for the reasons above set forth.

No question has been raised on this application as to the propriety of the order made by Judge Mickle, in so far as the merits are concerned.

I must, with regret, come to the conclusion that the order should be quashed by reason of want of jurisdiction over the territory in which the licensed premises are situated.

The order for the writ of certiorari must issue, but without costs.

BRITISH COLUMBIA.

LAMPMAN, Co.C.J. JANUARY 5TH, 1910.

COUNTY COURT OF VICTORIA.

OLIPHANT v. FISHER.

Trespass—Injury to Land—Damages.

Action for trespass to land.

Child, for the plaintiff.

Kemp, for the defendant.

LAMPMAN, Co.C.J.:—In July, 1907, the plaintiff owned a field on Cook street near Beacon Hill Park. It was fenced and had been surveyed into lots, and the lots were marked off with posts. The defendant, without permission, sent a man with team and mowing machine and cut some hay off the property, and the plaintiff says that in cutting the hay so many of the posts were pulled out that he had to have a new survey made, which cost him $100. This new survey was made in September, 1907, by Mr. Ellacott, who sued the defendant for the amount of his fees. The defendant disputed the amount as being too large, but Mr. Ellocott recovered the full amount claimed, $100, the trial taking place in April, 1908. Witnesses for the plaintiff say that the stakes were taken out and put in piles, and for the defence the man who did the mowing says that he moved only a few stakes, and then put them back in their places.

The plaintiff and defendant had some conversations about the matter, and the defendant expressed himself as willing to repair any damage, but he never did anything.

In November, 1908, Oliphant bought a cow from Fisher, and paid him $45 in cash, and apparently at that time the matter of the pulling up of the stakes was not mentioned. This and the fact that plaintiff has delayed his action so long (till June, 1909) inclines me to the opinion that the damage done by the defendant was not so serious as the plaintiff now alleges. However, the defendant did go on the land without the owner's authority and pulled up stakes and cut hay, and certainly did some damage. I think $35 will cover it, and for that amount, with costs, the plaintiff is entitled to judgment.

BRITISH COLUMBIA.

LAMPMAN, Co.C.J. JANUARY 5TH, 1910.

COUNTY COURT OF VICTORIA.

SHERRITT v. McCALLUM.

Mechanics' Liens — Preservation of Lien — Work Done by Sub-contractor after Time for Filing Lien Expired—Attempt to Preserve Lien—Sub-contractor Going on Premises in Spite of Notice Forbidding him—Trespass — Mechanics' Lien Act, secs. 4, 7.

Action to enforce a mechanic's lien for the sum of $160.

Gregory, for the plaintiff.

Harold Robertson, for the defendant.

LAMPMAN, Co.C.J.:—By a written contract one John Young agreed to erect for the defendant a house at Foul Bay according to certain specifications. Under that portion of the specifications dealing with plastering, it was provided that the plasterer should "cut out and make good all defects arising from whatever cause and make good after other tradesmen have finished work."

The plaintiff was a sub-contractor to Young for the plastering work called for in the specifications.

The plaintiff completed the main part of his plastering work before the 14th July, but, on his applying to Young for payment, Young told him that he had thrown up the job, and the plaintiff afterwards made out his account shewing a balance of $160 due him and sent it to the defendant.

It appears that Young got into financial difficulties and failed to go on with the building of the house, and the defendant was forced to have it completed himself by day labour. No formal agreement was made cancelling the contract. On the 20th July the plaintiff gave the defendant notice that he intended to claim a lien, but no proceedings were taken. Under the Act the lien-affidavit must be filed in 31 days after the completion of the work, or else the lien expires; so about the 20th August the plaintiff was in a serious plight, as neither Young nor McCallum would pay him, and the 31 days had expired, and he had filed no affidavit. He then hit on the ingenious expedient of going to the unfinished house and touching up blemishes, &c., made in the plaster by the workmen who had followed him. But in the meantime the defendant, who had been having a lively time with the claimants, had instructed his foreman on the job to allow no one but his own workmen on the premises. A couple of days before the 25th August the plaintiff sent his son to do the plastering, but he was refused permission to enter the premises by the defendant's workmen; but on the 25th August the plaintiff himself went, and, notwithstanding that the defendant's foreman, who was there, told him that the defendant had told him (the foreman) not to allow any of the contractors into the building to finish their work, he went in and did 4 or 5 hours' work, putting on some dentals that had been knocked off, and fixing up some blowholes and cracks. He then filed his affidavit and brought his action, and contends that this last work relates back and he is entitled to a lien for the full amount unpaid.

Under sec. 4 of the Mechanics' Lien Act a lien is given only in respect of work done at the request of the owner; the plaintiff was a trespasser and had express notice that he was not wanted to do any work, and sec. 4 therefore does not apply. Neither does sec. 7 apply—it provides that every improvement mentioned in sec. 4 constructed upon any lands with the knowledge of the owner or his authorised agent shall be held to have been constructed at the instance of such owner, unless, within 3 days after obtaining know-

ledge of such construction, he gives notice that he will not be responsible for the same by posting up a notice to that effect in some conspicuous place on the land. The defendant posted up no notice.

Section 7 was considered by the full Court in Anderson v. Gidsal, 7 B. C. R. 404, where it was held that it did not apply to work done at the instance of the owner already provided for by sec. 4, and that it only applied to cases in which the owner has not authorised the work which was done under an agreement with a supposed owner, or to cases where improvements are done upon lands by mistake, and the owner stands by in order to take advantage of the work done.

The circumstances shew plainly that the plaintiff was not making a bona fide attempt to complete his contract, but was, instead, trying to manufacture a lien, and his action must be dismissed with costs.

BRITISH COLUMBIA.

HUNTER, C.J. JANUARY 13TH, 1910.

SINGLE COURT.

REX v. COUNCIL OF THE DISTRICT MUNICIPALITY OF NORTH SAANICH.

Municipal Elections—Electoral Roll—Status of Voters—Representatives of Incorporated Company—Representation Limited to one Person — Court of Revision—Excess of Jurisdiction—Certiorari — Misconstruction of Statute—Injunction—Costs.

Motion for an injunction or for a mandamus or certiorari, in the circumstances stated in the judgment.

W. J. Taylor, K.C., for the relator.

T. Fell, for the defendants the council.

F. Higgins, for the other defendants.

HUNTER, C.J.:—In this case the promoter of the proceedings, a registered voter in a rural municipality, complains of the refusal by the Court of Revision, on his applica-

tion, to expunge the names of 4 out of the 5 individual defendants from the electoral roll.

He first sought to enforce his objection by bringing injunction proceedings against the defendants, but it seems to me that he has no status, and that the fact that the defendants are on the roll is a good answer to those proceedings. No instance has been brought to my notice which shews that one voter may attempt to enjoin any other registered voter from attempting to exercise his franchise, and I should be surprised to find any such case; and I therefore dismiss the motion for an injunction.

However, the promoter has also proceeded by way of certiorari and mandamus, and now seeks to have the roll amended by expunging the names of 4 of the defendants. The proceedings were rightly enough directed against the council, who has as a Court of Revision, and the municipal clerk, who has the custody of the roll, but, as Mr. Fell, who appeared for them, disclaimed any desire to uphold the right of the other defendants, I sent for Mr. Higgins, who appeared and stated that he wished to be heard in opposition to the application, and the matter was accordingly adjourned till to-day to enable him to do so.

Mr. Higgins now objects that the Court has no jurisdiction under these writs to make such an order, and urges that, as no appeal is given by the statute from the decision of the Court of Revision, such decision is final.

There is no doubt that the decision impugned is of a judicial character (in fact the council are directed by the statute to hold a Court to hear and determine objections to the roll), and therefore it may be brought up for examination by a writ of certiorari, in the absence of any enactment to the contrary. Now the roll shews, on its face, that 5 persons have been allowed to remain on the roll by the Court of Revision as the duly authorised representatives of an incorporated company which is desirous of exercising the franchise in the municipality, whereas it is evident, by sec. 10, that the legal entity known as a company is to be represented for voting purposes by only one individual, and not by an indefinite number. It is obvious that, if it were otherwise, there would be nothing to prevent a thousand persons from being so registered and thereby acquiring a right to vote in a particular municipality, which they would not otherwise have, and in respect of a small parcel which could not other-

wise be the foundation for more than one vote. That resident individuals should each be compelled to found their right to vote on a parcel of land, while a horde of non-residents could combine together and, by means of an incorporated company, all acquire an individual right of voting in respect of the same parcel, is obviously not the intention of the legislature, and any attempt to so acquire a vote is a fraud on the Act, and the electoral rights and privileges thereby conferred; and it is, of course, the duty of the Court to frustrate all such attempts if possible. There is no doubt that, as a general rule, where the proceedings have been conducted in accordance with the fundamental rules of justice, certiorari will not lie where the tribunal has exercised its judgment on matters within its jurisdiction, and there is equally no doubt that it will lie where there has been either an excess or total absence of jurisdiction; but I think that the power of the Court to interfere in the present case may rest either on the ground that there was an excess of jurisdiction in putting 5 persons on the roll, when only one should have been put on, or on the ground (which I have not time to go into on the present occasion) that in so doing there is manifest error on the face of the proceedings.

Mr. Higgins argued that the 5 persons were not put on the roll as representatives, but merely left there in that capacity. The argument is fallacious: what happened was that these 5 persons, whose names appeared on the roll as freeholders, were decided not to be so qualified on the objection being taken, but were adjudged to be qualified in their representative capacity. They were, in effect, struck off as freeholders, and then put on as representatives, although the formality of eliding and again inserting their names was not and need not have been adopted.

He then argued that it was merely a case of misconstruction of the statute, but it is needless to cite authority for the proposition that the Court could not give itself jurisdiction in this way to increase the number allowed by the statute.

With regard to the remedy to be applied, the Court of Revision has become defunct, and, even if it had not, it might be illusory if I were to direct it to meet and correct the roll. inasmuch as the election takes place the day after to-morrow. The mandamus will, therefore, go to the municipal clerk, viz., the defendant Brethour, in whose custody the roll now

is. to expunge the names of all the Porters, except the first (Robert John Porter) from the roll.

The applicant is entitled to the costs of these proceedings against all the defendants, while the defendants the Porters should indemnify the other defendants, as they disclaimed any desire to support the action of the Court of Revision, and in fact Mr. Fell quite candidly admitted that it could not be supported.

On the other hand, the applicant will pay the costs of the motion for the injunction.

I ought to add that, when the question of costs was mentioned, Mr. Higgins took the ground that he was dragged into the proceedings by the Court; but, if I had not given him the opportunity of resisting them if he saw fit, as his clients alone had any real interest in the matter, no doubt much would have been said about the injustice of deciding the matter behind his back.

I may also add that I have given my reasons to-day as soon as possible in order that any party aggrieved might be able to apply at once to the Court of Appeal.

BRITISH COLUMBIA.

GREGORY, J. JANUARY 15TH, 1910.

TRIAL.

BARNET McDONALD LUMBER CO. v. UNION STEAMSHIP CO.

Negligence—Finding of Fact—Evidence—Reference as to Damages.

Action for negligence in towing a boom of logs from Sutton's camp on St. Vincent bay to Fraser river in April, 1909, whereby the defendant lost 342 cedar logs belonging to the plaintiff.

Abbott, for the plaintiff.

Davis, K.C., for the defendant.

GREGORY, J.:—At the close of Mr. Davis's address, as he was unable to remain, it was agreed by him and Mr. Abbott, counsel for the plaintiff, that the Court might, instead of delivering a written or verbal judgment reviewing the evidence, etc., simply give judgment for the plaintiff or defendant and direct an inquiry as to damages.

I find the defendant guilty of negligence and give judgment for the plaintiff with costs for the 342 logs lost, and, in case the parties are unable to agree as to the value of the lost logs, I direct that the same be inquired into before the district registrar.

In summarily disposing of the matter in this way, I feel that I must add that I am unable to place any reliance upon the evidence of the defendant's captain, Daniel Donald, or the mate, John Baillies. Mr. Davis, in his address, admitted Donald's stupidity. I think he might have included Baillies. Donald began his work, according to his own story, by starting out with an improperly fastened boom and without calling the attention of Mr. Sutton to the alleged defects—Mr Sutton being present at the time, and the defects, if any, but which I do not find, capable of being easily remedied. It was Donald's first trip on that tug and the first time for 14 or 15 months he had towed on that course. The evidence of Captain Trueman of the tug "Vancouver" appeared to me to be the most reliable as to the weather conditions, etc. He was a fair and most intelligent witness.

BRITISH COLUMBIA.

GREGORY, J. JANUARY 17TH, 1910.

CHAMBERS.

RE SIMPSON v. WIDRIG.

Small Debts Court—Jurisdiction—Order for Committal—Action for Damages for Breach of Contract—Prohibition—Objection not Taken at Trial—Appeal Launched but not Perfected—Want of Jurisdiction not Appearing on Face of Proceedings—Manifestation by Affidavit.

Application by the defendant for a writ of prohibition prohibiting the enforcement of a committal order made by

H. O. Alexander, stipendiary magistrate, sitting in the Small Debts Court.

The defendant contends that the magistrate had no jurisdiction under the Small Debts Court Act, R. S. B. C. ch. 55, sec. 2, sub-sec. 2, to try the case, as it was not an action for debt, but rather one for damages for breach of an agreement. This contention appears to me to be sound: Stephen on Pleading (1866), p. 11; Stephen Com., vol. 3, p. 373. A action of debt is one to recover a liquidated or certain sum of money.

It cannot be said that in this case the sum was liquidated, without first alleging that the plaintiff had rendered the service contracted for and fixing the number of days his boat was employed. That being done, it would be a mere question of calculation. But it was not done; the boat was never used. The action is, therefore, similar to the old action of assumpsit to recover compensation in damages for an injury sustained by the non-performance of a parol agreement.

But the plaintiff contends that the defendant, having launched, but not perfected, an appeal, is now too late—and that a writ of prohibition will not lie unless the want of jurisdiction appears on the face of the proceedings, and he cites: Broad v. Perkins, 21 Q. B. D. 533; Channel Coaling Co. v. Ross, [1907] 1 K. B. 148; Ricardo v. Maidenhead Local Board of Health, 27 L. J. M. C. 73; Brown v. Cocking, L. R. 3 Q. B. 672; Elston v. Rose, L. R. 4 Q. B. 4. But these cases hardly meet the present position. Broad v. Perkins is meagrely reported, and only goes to the extent of saying that the writ is discretionary when the inferior Court has exceeded its jurisdiction, and the House of Lords case referred to by Lord Esher in his judgment was a case where the defect was not apparent, and the applicant for the writ had an opportunity of bringing it forward in the Court below, but without excuse thought proper not to do so.

In Channel Coaling Co. v. Rose, Broad v. Perkins was cited to the Court. The Court agreed that in some cases the granting of the writ was discretionary, but in that case the writ was granted, although the defendant had an alternative remedy. The case, therefore, so far as it affects the one before the Court, assists the defendant.

In Ricardo v. Maidenhead Local Board of Health, Martin, B., and Watson, B., held that after judgment the case must be apparent and clear (which it seems to me to be in

this case) before the Court will grant the writ, and, in that case, had the application been acceded to, the matter would have been absolutely at an end. But here the plaintiff can proceed in the proper Court to recover any damage he has suffered, the proceedings before the stipendiary magistrate having been without jurisdiction.

Brown v. Cocking only decided that the Court would not, on an application for a writ of prohibition, review the finding of the magistrate on conflicting evidence, though on a point going to his jurisdiction only. In the present case there is no conflict of evidence on the question of whether the plaintiff's claim is a debt or not, which is the question of jurisdiction here. It is a pure question of law on undisputed facts; and in this connection Elston v. Rose is a distinct authority against him. There the rule nisi for the writ was made absolute, Cockburn, C.J., stating at p. 7: "When the Judge has given himself jurisdiction by coming to an erroneous conclusion upon a point of law, he is in fact without jurisdiction, and has no authority to entertain the question."

The question to decide here is—Is the want of jurisdiction made apparent to the Court?

In In re W. N. Bole, 2 B. C. R. 208, the Court (Sir Matthew Begbie, C.J., and Drake, J.), held that statements of fact necessary to found jurisdiction appearing on the proceedings could be contradicted, the Chief Justice stating, at p. 211: "If the fact found be an essential to jurisdiction . . . it may be shewn that there was no evidence to warrant that finding."

We have before us the minutes of evidence taken before the magistrate, made an exhibit to the plaintiff's affidavit, and also the affidavit of both plaintiff and defendant; and in Ricardo v. Maidenhead Local Board of Health affidavits appear to have been used, and, in the present case, the plaintiff has raised no objection to the reading of the defendant's affidavit.

The defendant cites the following cases to shew that the Court will direct the writ to issue notwithstanding the defendant's appearance on the trial and his launching an appeal which he subsequently abandoned—and they appear to sustain his contention.

Farquharson v. Morgan, [1894] 1 Q. B. 552 (C.A.), where it was held that the writ must issue when the total want of jurisdiction appears on the proceedings—though the defendant actually acquiesced in the exercise of jurisdiction by the inferior Court.

This case was approved and followed by the Court of Appeal in Alderson v. Palliser, [1901] 2 K. B. 833, which held that, as the want of jurisdiction appeared on the face of the proceedings, the want of jurisdiction could not be waived. This was a case very similar to the present one, the County Court Judge having made an order for committal, as here, for non-payment of moneys directed to be paid on the hearing of a judgment summons. The practice only permitted the judgment summons to be issued upon affidavit setting out certain facts which had been omitted. There is no such practice here, the summons being issued on certificate of judgment only.

In In re Thompson v. Hay, 20 A. R. 379, the defendant, as in this case, objected to the jurisdiction of the Court, and, though he called no witnesses, he cross-examined the plaintiff's witnesses. He had an immediate statutory remedy by applying to have the proceedings transferred to another Court, but did not avail himself of it, and the writ issued; Burton, J.A., stating at p. 382: "Whenever the want of jurisdiction is established in the higher Court, it is not a matter of discretion, but the Court is bound to interfere, even though there may be a possibility of correcting it by appeal".

There will be a rule absolute for the issue of the writ, and the costs will follow the event, unless the plaintiff shall within 3 days, and on 24 hours' notice, shew cause to the contrary.

BRITISH COLUMBIA.

LAMPMAN, Co.C.J. JANUARY 19TH, 1910.

COUNTY COURT OF VICTORIA.

ALLAN v. MACEACHERN.

Contract—Boat Built by Defendant for Plaintiff—Dispute as to Price—Refusal of Defendant to Deliver Boat—Action for Detention—Counterclaim for Extras and Ground Rent—Damages.

Action for $100 damages for the detention of the plaintiff's launch by the defendant.

Moresby, for the plaintiff.

Kemp, for the defendant.

LAMPMAN, Co.C.J.:—The launch was built for the plaintiff by the defendant by contract, the plaintiff alleges; and by day labour, the defendant alleges.

The launch is about 30 feet long, and was constructed in the defendant's back yard at his residence.

W. J. Stephens, a boatbuilder, a witness for the plaintiff, examined the launch after she was completed, and says that he would have built her for $352. William Turpel was called on behalf of the defendant to give evidence of the value of the launch, but, where his opinion conflicts with that of Stephens, I must accept that of Stephens, because Turpel says that Stephens is an authority, and he is not.

William H. Braden acted for the plaintiff in making the arrangement with the defendant, and he says that the defendant contracted to do the work on the launch for $275, but whether he or the defendant is right in his contention I need not definitely decide, in view of the manner in which the parties subsequently dealt with the matter.

The launch was finished on the 6th August, and under date of the 10th August the defendant rendered Braden an account shewing a balance due him of $368. On the 30th August the plaintiff saw the defendant and paid him in cash $175, and arranged that the balance, which they then agreed on at $60.50, should be paid thus—$30 in 10 days, and $30.50 in 30 days. It was then arranged that the defendant should put in towing posts and do some other extra work on the launch, but later in the day Allan changed his mind about the extras and wrote a letter saying so, and saying also that he had instructed Braden to get the launch taken down to McIntosh's boat-house. This letter started the trouble, and the defendant at once replied to it, saying that the plaintiff must pay up before removing the launch, and he demanded $21.65 in addition to the $60.50. On the 9th September the defendant cashed the plaintiff's cheque for $30.50, but still refused to give up the launch.

I have no doubt that the defendant's account for $21.65 for extras, &c., was an afterthought, and I see no reason why he should not have abided by his bargain made on the 30th August. For a launch which, if it had been built by an expert launch-builder, would have required labour to the

extent of $352, the plaintiff has paid for labour the sum of $513, of which amount the defendant received $358 for his labour alone.

The launch was commenced in March, and in the defendant's counterclaim he claims $2 per month ground rent while the launch was being made. No promise by the plaintiff to pay such a charge is alleged, and, in default of an agreement to pay, I fail to see how such a claim can be successfully maintained. The claim seems to me a preposterous one, and a litigant by making such a claim runs a great risk of prejudicing his chances of succeeding in respect to the other portions of his claim.

On the 30th August the plaintiff and the defendant agreed on $60.50 as the amount due; on the 8th September the defendant received the balance of the amount, and should have delivered the launch to the plaintiff. The plaintiff had to hire a launch during the months of September and October, and paid therefor $50, and, besides, has been put to the annoyance and inconvenience of not having the possession of his own launch. I think $65 will cover the damages to which the plaintiff is entitled, and for that amount with costs the plaintiff is entitled to judgment.

ALBERTA.

TAYLOR, DIST. CT. J. JANUARY 6TH, 1910.

DISTRICT COURT OF EDMONTON.

ROSE v. COLLISON.

Money Lent—Action for Return—Illegal Purpose—Gaming —"Poker"—Common Gaming House—Evidence—Criminal Code, sec. 226—Banker—9 Anne ch. 14—5 & 6 Wm. IV. ch. 41—12 Geo. II. ch. 28.

Action for money lent.

E. B. Williams, for the plaintiff.

N. D. Mills, for the defendant.

TAYLOR, DIST. CT. J.:—The plaintiff, defendant, and two others were engaged in a game of cards called "Poker." The plaintiff kept the bank, and for cash gave certain chips which represented money in betting on the cards. The defendant borrowed a sum of money amounting to $115 from the plaintiff during the play. No money actually passed between them, but chips of the value claimed were handed by the plaintiff to the defendant. At the conclusion of the game, the plaintiff says he was very little, if any, ahead in the game. The position of the keeper of the bank gave him no advantage over any of the others. No fee or commission was paid to him for keeping the bank. The bank was kept for the convenience of all. At the conclusion of the play the defendant promised to pay the plaintiff the amount borrowed, at an early date.

The plaintiff as keeper of the bank squared up with the other two players, who were the winners in the play, giving to one his promissory note and a verbal promise to pay the other the amount due him.

Later on the defendant refused to pay the plaintiff, and the plaintiff now brings this action to compel payment.

There was no dispute over the facts.

The statement of defence merely denies that the defendant owes the money. This was amended at the trial by an alternative defence, which sets up that if the money was lent it was to be used for an illegal purpose, which was known to the plaintiff at the time.

There is no doubt that the money was borrowed. That is not denied by the defendant. He does state in his evidence that the plaintiff cheated in the game and the cards were marked. There is no other evidence to substantiate this. In fact, one of the other players stated in his evidence that the defendant told him at the conclusion that the game was a fair one. It is quite natural for the loser to give expression to such words, but, as far as the evidence goes, he has nothing to support the same, and, I take it, it was only the expression of a loser.

The question then comes as to whether the purpose for which the money was lent was illegal. The learned counsel for the defence contends that it was illegal under sec. 226 of the Criminal Code, that is, that the play was conducted in a common gaming house. The game was played in a room of a hotel, which was used ordinarily as a barber shop. The

same persons had played in the same room on several occasions before. There is no evidence that any other persons had ever played in the room before or were playing on the evening the loan was made. The parties were, as far as the evidence goes, playing a friendly game; they were not organised as a club. There does not seem to me to be sufficient evidence to bring it under sub-sec. (a) of the section. As regards sub-sec. (b), there is evidence that during this time the plaintiff was the banker, but there is no evidence that he was exclusively the banker. The defendant in his evidence states that the plaintiff had a trunk in the room wherein he kept cards and liquor. I do not think that this is evidence for me to find that this room was used as a common gaming house, or that the plaintiff was the proprietor of the room, or that he had any more proprietorship of the room than any of the others.

I have come to the conclusion that there is not sufficient evidence for me to hold that the room was used as a common gaming house.

The learned counsel for the defence argues that part of the statute 9 Anne ch. 14, as amended by 5 & 6 Wm. IV. ch. 41, is still in force. There is no doubt about that, but this affects only securities won at play. This case is very different. This is not for money won at play, but for money lent for the purpose of play, and the cases he quotes of Young v. Moore, 2 Wils. 67, and McKinnell v. Robinson, 3 M. & W. 434, do not, in my opinion, apply.

The law is fully discussed in Beeston v. Beeston, 45 L. J. Ex. 232, which was a case very similar to this. Cleasby, B., says: "I think this action was not to recover money paid under a contract of wagering, and that the plaintiff is not precluded from suing because some of the money was advanced for the purpose of laying bets." Pollock, B., says in the course of his judgment: "It is not illegal by common law nor by 16 Car. II. ch. 7, nor by 9 Anne ch. 14, nor by 5 & 6 Wm. IV. ch. 41, which is still in force and only relates to securities won at play between the parties to that wager." Amphlett, B., says also: "But the note here was not so given for a bet, but for a certain amount of money received by the defendant on behalf of the plaintiff."

I cannot find that we have any law declaring the game in question illegal.

The statute 12 Geo. II. ch. 28 makes certain games illegal, but "Poker" is not one of those so mentioned.

The game not being illegal, the contract to lend another money for that play cannot be illegal.

I will, therefore, give judgment for the plaintiff with costs.

ALBERTA.

STUART, J. JANUARY 8TH, 1910.

TRIAL.

JONES v. MORRIS.

Vendor and Purchaser—Contract for Sale of Land — Payment of Purchase Money by Instalments—Default—New Agreement—Construction—Option or Substantive Agreement—Time—Forfeiture—Title — Specific Performance.

Action by purchaser for specific performance of a contract for the sale and purchase of land.

C. C. McCaul, K.C., for the plaintiff.

O. M. Biggar, for the defendant.

STUART, J.:—On the 6th November, 1906, the defendant agreed to sell to the plaintiff and the plaintiff agreed to buy from the defendant the north-west quarter of section 4, and the north-east quarter of section 5, and all of section 8, in township 47, range 24, west of the 4th meridian, for the sum of $12,000, payable $3,000 in cash, the receipt whereof was acknowledged in the written agreement, and the balance in 4 equal instalments of $2,250 each on the 1st February in the years 1908, 1909, 1910, and 1911. The sum of $3,000 expressed to be paid in cash was not paid in that form, but in another form, to which I shall presently refer. No other sums were paid, and the purchaser continued in default after the 1st February, 1908 and 1909.

After some negotiations between the parties, to which I shall again refer, the parties entered into another agreement which I think it best to quote here in full:—

"Articles of agreement made in duplicate the 27th day of May, 1909, between John Morris, of the city of Edmonton, in the province of Alberta, real estate agent, hereinafter called the party of the first part, and Thomas Jones, of the same place, farmer, hereinafter called the party of the second part: Whereas, by articles of agreement dated the 6th November, 1906, the party of the first part agreed to sell to the party of the second part, and the party of the second part agreed to purchase from the party of the first part, certain lands and premises mentioned in the said articles of agreement; and whereas on the 18th April, 1907, the party of the second part filed in the land titles office for the North Alberta land registration, 3 certain caveats, which said caveats were registered as numbers 3445, 3446, and 3447 R. 110; and whereas the party of the second part has agreed to release all his interest under the said agreement for sale with the party of the first part, and has executed releases of the said caveats; and whereas the party of the first part will require to pay certain amounts to the Canadian Pacific Railway Company, William A. Howard, and Catharine Howard, to secure a title to the north-west quarter of section 4 and the north-east quarter of section 5 in township 47 in range 24, west of the 4th meridian, in the province of Alberta, containing by admeasurement 320 acres more or less, amounting to $3,000; and whereas the party of the second part has agreed to pay and discharge certain taxes and seed grain incumbrances which are now charged against the said lands or any part thereof, which said amounts are not included in the said sum of $3,000: therefore this indenture witnesseth that the party of the second part releases to the party of the first part all his right, title, interest, claim, and demand, of, in, and to the north-east quarter of section 5 and section 8, all in township 47 in range 24 west of the 4th meridian, in the province of Alberta; in consideration whereof the party of the first part hereby gives to the party of the second part an option, irrevocable within the time for acceptance herein limited, to purchase, free from incumbrances, the north-west quarter of section 4 and the north-east quarter of section 5, both in township 47, range 24, west of the 4th meridian, in the province of Alberta. The purchase price of the said property shall be the payment to the Canadian Pacific Railway Company, Catherine Howard, and William A. Howard, not exceeding $3,000, the moneys due them under an

agreement for sale dated the 8th September, 1906, with said Morris, and of the payment of certain seed grain incumbrances not included in the said amount, against the said lands, and of certain taxes chargeable thereon, which shall be paid forthwith on the acceptance of this option. The option hereby given shall be open for acceptance up to but not after the 15th July, 1909, and shall be accepted by payment of the said amounts in full, on or before 12 o'clock noon on that date. Time shall be the essence of this agreement.

"In witness whereof the parties hereto have hereunder set their hands and seals the day and year first above written."

(Signed and sealed by the parties.)

The chief contest at the trial was over the proper interpretation to be put on this latter agreement. The defendant contended that it was an option, strictly so-called, and that, as the plaintiff had not exercised his rights under it by the time limited therein, namely, the 15th July, 1909, he had lost them entirely. The plaintiff contended that it was nothing more or less than a substantive agreement of sale. He also contended that, even admitting that it was an option, the time had been extended by Morris, the defendant, by a verbal agreement prior to the 15th July, and again on that same day. A great deal of evidence was given for the purpose of enabling me to arrive at an exact conclusion upon the fact whether or not such an extension had been made. But, as I now view the case, I think it is unnecessary for me to decide this point of fact. The agreement before me must be interpreted just as any other agreement. It is absurd to ask the Court to say, first, that it is what is called an option, and then use that catch-word as an aid to interpretation. The interpretation of the words and meaning of the agreement must come first. The result of this may be that it is discovered to be an option strictly so-called; or it may be that, while it presents many features of such an option, some particular elements are lacking; or that, owing to the presence of some particular elements in the agreement, while it may present many features of an option, yet the strict rules which are generally considered applicable to an option cannot in justice be applied in the case.

Now, in the first place, a sum certain is usually fixed in what is called an option agreement. In the agreement before me no fixed sum is mentioned. Only a maximum amount is referred to. The real sum or sums which Jones was obliged to pay are not ascertained in the agreement itself. Jones is to pay, not to Morris, but to two other outside persons, certain sums due to them. There is no evidence to shew that these sums ever were fixed or ascertained prior to the 15th July. These were sums which Morris was bound to pay to these other persons as his vendors. It was Morris who had contracted with them, and therefore it was only by Morris and them that the exact sums payable could be settled. This is one feature of the agreement which sharply distinguishes it from an option, strictly so-called.

In the next place, the acceptance of the option is to be indicated, not by a notice, written or verbal, of an intention to accept, which is usually the case, but by actual payment of a sum of money. It is true that in many cases a payment of a certain sum is agreed to be made "upon acceptance of the option," but, even then, the payment of the money is distinct from the notice of acceptance, and it is only where the person granting the option has title in himself, and is in a position to convey at once, that such payment at the exact time is considered essential. If the title is outstanding in third parties, the proposing purchaser has surely a right, after notification of acceptance within the time, to protect himself by withholding payment until the title is secure. This being so, why should the proposing purchaser be expected to risk his money on an unsecure title simply because his agreement happens to be so drawn that payment of the money is indicated as the manner of expressing acceptance of the option?

In a note of an American case to be found in Am. & Eng. Encyc. of Law, 2nd ed., vol. 21, p. 932, it is said: "Although the option makes payment within a stated period the evidence of acceptance, the strict rule (i.e., as to time) will be relaxed in a case where it is known that the vendor cannot perform within the time for the delivery of the deed. It is unnecessary to go through the form of tender when that tender cannot be lawfully accepted." This appears to me to be good sense and good law.

It may be urged that Jones was not able to pay because he had not the money. Leaving aside the question whether

this sounds very well in the mouth of one who was himself in default apparently, and who was obliged to look to Jones for the money with which to get Jones the title which he was bound to give him, there is this to be observed, that lack of money was not the only reason why Jones could not pay the exact sum required on that day. There is no evidence to shew that he was ever informed of the sums which he would have to pay, and, if strictness as to time is to be enforced by Morris, then he should, in my opinion, have furnished Jones with the information necessary to enable him to make his tender on the exact day. If Jones had sat down to draw up a cheque in the office of Morris on the day in question, there is every reason to doubt whether the cheque could have been drawn at all.

Looking at the case also from another aspect, it seems to me that we are furnished with other grave reasons why this agreement cannot be construed and enforced with all the rigidity of an option. On the face of it, it refers to a prior agreement for the sale and purchase of a larger quantity of land. The evidence shews that $3,000 had been paid by Jones to Morris upon this agreement, by means of a transfer of certain real estate in Edmonton. Not a single thing is said as to what is to become of this sum in the agreement before us. Jones apparently renounces all his right under the former agreement, while Morris does not renounce anything. He merely gives Jones the right to purchase a portion of the land covered by the former agreement, that is, he gives him the right to do something which he already had a right to do in another way. It is as clear as noon-day upon the evidence that this former payment was never intended to be a complete forfeit for the benefit of Morris, but that it was looked upon by the parties as being taken into account in fixing the amount to be paid for the half section. Morris himself admits the land was worth $5,440, while other evidence shews it to have been worth a much larger sum. It it absolutely impossible to contend that Morris really thought he was selling or intended to sell the half section to Jones for $3.000 or something possibly less. This being so, it is quite apparent that, so far from Jones having merely an option strictly so-called, he had in fact made a large payment on account of the purchase price.

The agreement of the 27th May, 1909, recites in part the former agreement, and is quite obviously based upon

the condition of affairs existing under that former agreement. I think, therefore, the former agreement, as well as the position in which the parties stood with regard to it, can and indeed must be looked at in order to arrive at the true construction of the later one. Having done this, I think this later one does not express what the parties intended at all. Surely Morris cannot contend that he never intended to release his rights under the former agreement, and that, notwithstanding the agreement of the 27th May, he might still sue Jones for the overdue instalments of the former one. If he intended, as I think he did, to renounce his right to do this, then the agreement of the 27th May nowhere expresses any such intention. Neither does it express what I have held to have been clearly the intention of both parties, that the sum paid on the old agreement should form a part of the real purchase price of the half section of land. In my view, a forfeiture of this sum, or of such portion as Jones was entitled to have credit for, was never intended at all. That being so, the agreement of the 27th May here again does not express the real intention of the parties.

For these reasons, I think it is impossible to hold that time was of the essence of the agreement, although it is so stated on its face. Even treating the agreement as an option, as it is called, I think, for the reasons given, that that feature of an option which makes time of the essence of the contract cannot be applied. I am more disposed, however, to look upon the agreement as merely a substituted agreement of sale, to which the ordinary law as administered in this Court with respect to agreements of sale of land must be applied. It seems to me clear that, in the peculiar circumstances of this case to which I have referred, the uncertainty of the sums to be paid, the defect in the title of the vendor, as well as the fact that the payment when made at all was to be made not to the vendor but to other persons, all combine to destroy the effect of the clause in the contract making time of its essence. Within 8 days of the time fixed, the plaintiff's solicitors, a responsible firm, wrote to the defendant informing him that their client was prepared to carry out the agreement. But he had already taken his stand and had refused to deal with the plaintiff any longer. He had even, on his counsel's own admission, at least $1,300 of the plaintiff's money to the good, and he had

the benefit of improvements made by the plaintiff on the land. Yet he jumped at the sharp chance which he thought the strict interpretation of the agreement gave him, and refused to deal when a responsible firm of solicitors asked to meet him to put the business through. It is true that Jones had been long in default under the old agreement, but Morris gave him a new agreement, to which the ordinary rules of fair and reasonable business dealings should apply.

I am indeed strongly inclined to think that this plan of getting Jones to renounce his rights under the old agreement and of giving him an option, was adopted as a supposedly better scheme to get rid of Jones than an ordinary notice that he must pay within a reasonable time or his agreement would be cancelled. If this latter plan had been adopted simply, I should have considered the position of Morris with much more, indeed with a great deal of, favour. As it is, I think the drawing up of "the option" was somewhat of a catch which really caught Morris in its meshes instead of Jones.

I do not think I need to have recourse to the new jurisdiction as to relieving against forfeiture in order to give the plaintiff the benefit of this agreement. He is entitled to the ordinary decree for specific performance and to a reference as to title and to ascertain the amount due, and upon good title being found and upon payment of the sum found due into Court, and upon satisfactory evidence being given of the payment of the seed grain indebtedness and of the taxes, which, I understand, cover as well the land excluded from the new agreement, that is, section 8, the plaintiff will be entitled to a conveyance of the land in question.

The defendant, as the evidence shews, has sold the land subsequently to another person, who is not before the Court. I cannot deal with his rights here, and it may be that he will have to be brought before the Court before satisfactory title can be given, but that matter will have to be dealt with upon special application later on.

The plaintiff is entitled to his costs of the action.

ALBERTA.

JANUARY 18TH, 1910.

FULL COURT.

EATON v. CROOK.

Contract—Parol Evidence to Vary — Statute of Frauds— Written Agreement to Build House—Contemporaneous Oral Agreement to Accept Conveyance of Land as Part of Price — Consistent Agreements Standing together — Offer to Convey—Lien on Land for Amount Overpaid and Costs—Reformation of Contract—Form of Judgment.

Appeal by the plaintiff from the judgment of SIFTON, C.J., at the trial, directing the reformation of a contract, and dismissing an action to recover $1,100.

W. B. Allison, for the plaintiff.

W. L. Walsh, K.C., for the defendant.

The judgment of the Court (HARVEY, STUART, and BECK, JJ.), was delivered by

BECK, J.:—The plaintiff and defendant signed a paper which is summarised in the appeal book as follows: "Agreement made the 24th day of March, 1909, between the plaintiff and defendant Crook, whereby the plaintiff agreed with the said defendant to erect for him a frame residence on lot 5 in block 17 in the city of Edmonton, in the province of Alberta, according to plans and specifications agreed on by the parties: the work to be completed on or before the 1st July, 1909, provided that the materials and labour necessary for said completion can be procured in time for said date of completion: the consideration for the said agreement being $3,009.70, payable as follows: $1,700 to be paid when plastering was on the said building, and the balance within 10 days after the said contract was fulfilled."

The plaintiff built the house in accordance with the agreement.

It appears that the contract price has been satisfied except to the extent of $1,100.

The parties came together to negotiate in consequence of the defendant putting an advertisement in a newspaper which read as follows: "To builders and contractors. Advertiser requires dwelling-house built. Will pay $1,000 cash; balance in good suburban real estate. To see plans, call at 858 McDougall avenue, corner of Sutherland, evenings after 5 o'clock."

The plaintiff called at the defendant's house. A conference took place between the plaintiff and the defendant and his wife.

The defendant proposed that the plaintiff should take 10 lots in the Hagman estate at $100 on account of the contract price. The defendant described the lots, telling the plaintiff they were not all alike; that the Hagman estate was rolling land, sloping towards Park street, so that the lots were higher at the back than the front; that there was considerable brush and some poplar on them; that two of them might be touched by a slough and a portion of some of the lots had been used for a garden. The plaintiff looked at a map which included these lots.

After the lapse of a week or more other conferences took place, and, the defendant having decided upon changes in the plans of the house which increased the cost, 12 instead of 10 lots were agreed upon. There seems to be no real dispute that the plaintiff agreed to take these 12 lots in payment of $1,200 on account of the contract price, though, no doubt, it was on the strength of the defendant's representations. The evidence satisfies me that there was no misrepresentation. The document which I shall call the building contract was accordingly signed. The defendant's explanation why no reference to the lots appears in the building contract is this. He had inquired of the Canada Permanent Mortgage Corporation with a view to obtaining a loan upon the property upon which the house was to be built, and was led to believe that he could procure a loan for the necessary amount. He, therefore, at this time intended to make a formal application to that company for a loan of $1,700, the estimated cost of the building being then $2,900. The plaintiff said he could not carry on the building to completion without getting a payment on account during its progress. This would necessitate getting

an advance from the mortgage company during the course of construction, and in that event the company would probably require production of the building contract, and it was thought best that the company should not become aware of the arrangement about the lots. There is a dispute as to the question at whose suggestion mention of the lots was omitted, but it is to my mind clear that it was for the benefit of the plaintiff, that is, to enable the defendant to give the plaintiff a payment on account during the progress of the work, instead of paying him in full only on completion. The evidence satisfies me, too, that the plaintiff undertook to have the terms of the agreement as to the lots put into writing for signature by himself and the defendant. The building contract was drawn up by the plaintiff, and signed at his house. The defendant's wife says that on that occasion this further took place regarding the lots: "And then the plaintiff says: 'How about these lots? I should hope they are all right.' My husband said: 'They are. You will find them all right. There is some different from others, but on the whole they are a pretty good bunch of lots.' And he (the plaintiff) turned to the desk to take another agreement or form to have the lots written on. There was no form left to put the lots on. He said, 'That is rather unfortunate,' 'Well,' said Mr. Crook, 'Suppose we have a little slip appended?' He said: 'I will tell you what, I will get it drawn up, Mr. Crook, by a real estate agent in Edmonton;' and he said: 'I will be very busy, and it will be some time before I get to Edmonton. I will get it drawn up by a man who does it cheap here and you can sign it on coming over.'" The witness adding: "And probably about nine o'clock we left the house. Of course, my husband expressed dissatisfaction on leaving the house with the lots not signed for. Of course, he intended having the lots put in the contract, but, on the advice of the plaintiff, he thought he must be sure of getting some money, so that is how it came it was left out of the contract, but it was all mere accident that there wasn't another agreement form in the desk, that they weren't signed. It there had been a form, the lots would have been put in the form."

In her cross-examination she says: "Then plaintiff said: 'Well I will get the agreement drawn up here if you like, and you can sign it;' and he immediately took a slip of

paper and wrote the numbers of the lots and the block, dictated by my husband. That was for his guidance to get the agreement drawn up. He was to get the agreement drawn up for these lots in this block."

The defendant, while not detailing the conversation, corroborates his wife in all respects.

The plaintiff's version is as follows:—

"Q. On the day that this agreement was signed, just tell us what took place prior to its execution in regard to the lots? A. On the day the agreement was signed Mr. Crook told me when I was writing the agreement—

"Q. That is the agreement for the construction of the house? A. Yes, sir—that he didn't want the lots to appear in the agreement. The fact of his getting a loan on the property he wanted to make it appear to the loan company that he had paid $1,000 on the building himself in cash. He thought the loan company would advance him the money, as we would need some money before the building was completed.

"Q. Anything else said that day as to the nature of the lots, the character of them? A. The question was brought up as to the value of those lots, and I said: 'If these lots are not going to be mentioned in this contract, I don't see that they in any way ring into this deal at all. This contract calls for a cash consideration if we leave them out altogether;' and he said that was the way he wanted it to appear. And I said: 'If we are not going to put the lots in this contract—I must see the lots before I will take them.' He said: 'The lots are just exactly as I have described them to you, high, dry, open lots, no brush on them, no slough on them, and practically all under cultivation.' And I said: 'If the lots are just as you describe them, and I find those lots to be that way, all right, but, if they are not, I am not under any obligation to take them.'"

The extracts from and the references I have made to the evidence satisfy me that there was a final agreement that the plaintiff should take the 12 lots as representing a payment of $1,200 on account of the contract price, and that reference to the lots was omitted from the building contract for the supposed advantage of the plaintiff, and that the terms of the actual agreement, so far as they related to the lots, were intended to be put into writing at the

same time as the building contract was signed, and that this was not done owing to the parties finding that they had not at hand the materials which they thought necessary for the purpose, and on the independent agreement of the plaintiff that he would have the necessary additional document prepared. The result is, that the building contract was never intended by itself to constitute a binding contract between the parties. The agreement of the plaintiff to take the lots at $1,200 was an integral part of an entire contract. I find this to be clear upon the evidence, and I think I should have come to the same conclusion without hesitation, independently of the learned trial Judge finding to the same effect.

The questions for us to decide are, whether this evidence extrinsic to the building contract is admissible, and, if so, what effect is to be given to it. The leading general rule respecting the admissibility of extrinsic evidence to affect what is in writing is, that parol testimony cannot be received to contradict, vary, add to, or subtract from the terms of a valid written instrument: Taylor on Evidence, sec. 1132. To this general rule there are, however, a number of exceptions or limitations; but in some instances these so-called exceptions or limitations are not in reality such, but only subsidiary rules which shew what cases do and what do not in truth fall within the terms of the general rule above stated.

The evidence in question in the present case is not, in my opinion, excluded by force of the general rule; but, on the contrary, is admissible in accordance with a well established subsidiary rule; namely, that a writing, although on its face it appears to constitute in itself a complete contract, may, by oral evidence, be shewn to constitute only a part of the real contract, and, in some cases, to be more specific, to be merely a means adopted by the parties to carry their real agreement into effect. If the latter be the purpose, there may be an apparent inconsistency by reason of a writing stating a false relationship between the parties as a convenient means merely of carrying into effect their real purpose. This is obviously quite different from permitting, in the absence of a case made for the rectification of a mistake, evidence of the omission of a particular provision from an instrument which was intended to be the

complete record of the contract. The rule I have stated is established by innumerable cases.

Those holding that want of consideration can be shewn are instances of its application.

One of the earliest cases in which the rule is exemplified is Thompson v. Clubley (1836), 1 M. & W. 212, 46 R. R. 305. The action was on a bill of exchange by the immediate indorsee of the drawer-payee against the acceptor. The drawer-payee was called as a witness, and gave evidence that, having occasion to raise money, it was arranged between him and the plaintiff that the witness should give the plaintiff the bill sued on, but that the plaintiff should take it up, and that the witness should receive from the plaintiff bills of like value which the witness should take up, and that the defendant had not received any value for his acceptance. It was objected on the part of the plaintiff that this evidence was inadmissible, as it went to contradict the written contract of acceptance, which purported to be an absolute engagement to pay the bill; whereas it was proposed to shew that the acceptor was not to pay it, but that the plaintiff, who was the indorsee, was to take it up and not to sue the acceptor; the effect of which was to make an entirely different contract. The trial Judge, Lord Abinger, C.B., said that, in his opinion, the bill had really been taken by the plaintiff on a special contract by him not to sue the defendant. The plaintiff elected to be nonsuited, the Judge giving him leave to move to enter a verdict for the plaintiff for the amount of the bill. On motion being made accordingly, the Court refused a rule.

Webb v. Salmon (1849), 19 L. J. Q. B. 34, was an action by the payees of a promissory note against the maker. The note was payable on demand to the plaintiffs as executors. The defendant pleaded that, contemporaneously with the making of the note, an agreement in writing was made between the defendant and other named persons and the plaintiffs, whereby it was agreed that the note should not become due and payable until C. S. attained the age of 21, or, in the event of his death before that age, until certain moneys became divisible under the will of C. S.; the plea then alleged that C. S. was still living, and that he had not attained the age of 21, and that the plaintiffs accepted the note upon the terms and conditions of the said agreement and upon no other. A verdict was entered on

issue upon this plea. The Court of Exchequer Chamber held the plaintiffs entitled to judgment non obstante veredicto. This was affirmed by the House of Lords. The case is one of a contemporaneous agreement in writing. but I refer to it because it seems to me to bring out the distinction between evidence seeking to shew that a writing was never intended to express all the terms of the contract, but signed for the purpose of forming only one element of a contract, and therefore to be given such effect and only such effect as it was intended to have, and evidence seeking to shew (in the absence of a case made for rectification by reason of mistake) that a writing intended to be complete in itself does not express the real agreement.

Parke, B., in giving judgment in the Exchequer Chamber, said: "We cannot intend it to be an agreement in writing between the plaintiffs and the defendants, forming part of the same contract as that declared upon [the promissory note], though on a different sheet of paper, and so altogether altering its legal effect." Answering for the majority of the Judges to whom the Lords had submitted the question for consideration, Parke, B., said that the majority of the Judges thought that what the plea set up was that "the agreement alleged in the plea was made at the same time with the promissory note, not that it was part and parcel of the same instrument and to be treated and construed as if it was written on the same paper." The Lord Chancellor said: "There are two agreements here, if they may be so called—the note set forth in the declaration and the agreement set forth in the plea. Those two agreements, in one sense, are inconsistent with each other; but may they stand toegther? . . . The agreement and the note may well stand together." The House held that the agreement was effective, but that it did not afford a defence because there were other parties to it than the plaintiffs and the defendant, and it could not be treated as several.

In Lindley v. Lacey (1864), 15 C. B. N. S. 578, Hayes, Sergt., arguendo said: "The argument that the written agreement overrides the oral one is founded upon the assumption that the parties intended the former to express the whole bargain between them. The rule of law is clear that a collateral oral agreement, whether prior to or contemporaneous with the written agreement, is not excluded.

provided the two may consistently stand together." Byles, J., during the course of the argument, said: "All these cases proceed on the principle that extraneous evidence is always admissible to apply the agreement." In giving judgment Erle, C.J., said: "A long stream of cases have been referred to by my brother Hayes; but they all reduce it to a question of fact, as does almost every case which turns upon the construction of a written contract. If the instrument shews that it was meant to contain the whole baragin between the parties, no extrinsic evidence can be admitted to introduce a term which does not appear there. But, if it be clear that the written instrument does not contain the whole, and the jury find that there was a distinct collateral verbal agreement between the parties, not inconsistent with the written contract, the law does not prohibit such distinct collateral agreement from being enforced." Byles, J., agreed with this opinion, saying: "The case of Harris v. Ricket, 4 H. & N. 1, seems to me to be precisely in point. In that case Bramwell, B., in the course of the argument, said: 'It does not appear that the parties intended that the written agreement of the 17th February should be the entire agreement, but only a part of it;' and in giving judgment Pollock, C.B., said: 'The writing does not contain and was not intended to contain the entire obligation.' . . . The rule relied on by the plaintiffs only applies where the parties to an agreement reduce it to writing and agree or intend that that writing shall be their agreement."

Morgan v. Griffiths (1871), L. R. 6 Ex. 70, is really an application of the rule as I have stated it.

The cases in which it has been held that a conveyance absolute in form may be shewn by oral evidence to be merely by way of security are further instances. Security is agreed upon. The means adopted for giving the security is an instrument which does not state the true legal relationship, but is intentionally adopted as a convenient means of effecting the real agreement. The terms of the instrument are inconsistent with the real agreement, which may be proved by oral evidence; but the giving of the instrument in that form is not inconsistent but in accordance with the true agreement. Haigh v. Kay, L. R. 7 Ch. 469, Barton v. Bank of New South Wales, 15 App. Cas. 379, In re Duke of Marlborough, Davis v. Whitehead, [1894] 2 Ch. 133, are cases of this kind. These are some of a long line of cases

which establish that even the express provisions of the Statute of Frauds will not prevent the admission of extrinsic evidence under such circumstances.

In Chitty on Contracts, 15th ed., p. 123, it is said: "It has, moreover, been held that parol evidence is admissible to shew that an instrument does not contain the whole of the contract."

On reason and authority, I think the evidence of the real agreement between the parties in this case was clearly admissible. There may be an apparent inconsistency between it and the terms of the building contract which provide for payment in so many dollars, but I think the inconsistency is only apparent. The effect of the real agreement was that the contract price was fixed, and that, of that price, $1,200 should be paid by the transfer of certain land. In this view, the building contract and the oral terms of the real agreement—to use words I have already quoted—"may well stand together."

I think the Statute of Frauds does not prevent the defendant from setting up the real agreement by way of defence. The position is exactly the same as the case of a vendee of land making a payment on account of purchase money in pursuance of an oral contract. If the vendor is ready and willing to convey, the vendee cannot recover: Thomas v. Brown, 1 Q. B. D. 714, where Mellor, J., says: "The breaking off of the agreement was not in any sense the fault of the vendor. He was always ready and willing to complete the purchase and execute a conveyance, but the vendee chooses to set up this question of the Statute of Frauds and to say, 'Although I can have the contract performed if I please I repudiate it.' Under these circumstances I think it would be quite monstrous if the plaintiff could recover, and I am glad to think that the authorities are all opposed to her claim."

The law is laid down in the same sense in Brown on the Statute of Frauds, sec. 122.

The defendant offered to convey the land to the plaintiff. The plaintiff is, therefore, not entitled to recover the amount represented by it. He is entitled on request to a transfer, subject to this, that, as it appears that the defendant has, after crediting the agreed price of the lots, overpaid the plaintiff $100, the defendant is entitled to a lien upon the land for this sum. If there is any dispute about the amount, there

should be a reference. As the defendant is entitled to his costs of the trial and of this appeal, he is entitled to a lien upon the land for this amount also.

In the view I have expressed, it follows that I think the judgment is formally—but only formally—wrong in directing a reformation of the building contract.

In the result, I think the judgment should be amended by eliminating that direction; that, with that amendment, the judgment appealed from should be affirmed, with costs in the Court below and of this appeal; that the defendant should be declared entitled to a lien upon the land in question for $100, or, in case of dispute, to such amount as shall be ascertained on a reference, and for the amount of his costs. Leave should be reserved to apply, to meet, for instance, the possibility of the defendant failing to transfer the land, after satisfaction of the amounts for which he is entitled to liens upon it.

ALBERTA.

JANUARY 18TH, 1910.

FULL COURT.

WATSON v. JAMIESON.

Vendor and Purchaser—Contract for Sale of Land—Correspondence—Uncertainty as to Amount of Purchase Money—Ambiguous Offer by Letter — Acceptance by Telegram—Construction of Documents—Specific Performance Denied.

Appeal by the plaintiff from the judgment of SIFTON, C.J., dismissing an action for specific performance of an alleged contract for the sale and purchase of land.

The appeal was heard by HARVEY, STUART, and BECK, JJ.

O. M. Biggar, for the plaintiff.

D. S. Moffat, for the defendant.

STUART, J.:—On the 6th May, 1909, the defendant sent the following letter to the plaintiff: "With reference to lot

5, block 19, Edmonton, I will take $1,000 for it, half cash and the balance in 6 months, with interest at 5 per cent., or I will give you 10 per cent. discount for cash."

Upon receipt of this letter the plaintiff sent the following telegram to the defendant: "Will take lot as per your letter $900 cash."

Relying upon these documents, the plaintiff sued the defendant for specific performance. The action was dismissed by the Chief Justice, and the plaintiff appeals. In my opinion, the judgment was right. The contention of the appellant is that the words of the defendant's letter can only mean that the 10 per cent. discount was to be deducted from the whole price, as the telegram of acceptance assumed. The defendant contends that the words mean that the 10 per cent. discount was to be deducted only from the deferred payment.

It was also suggested during the argument that the document, being ambiguous, must be read most strongly against its author, and thus as offering the discount on the whole purchase price, and at the time I was rather impressed with this view. But, upon consideration, no one of these three contentions appears to me to present the true solution of the difficulty.

With respect to the suggested rule of construction against the author, I observe that in Taylor v. Corporation of St. Helens, 6 Ch. D. 270, Jessel, M.R., delivering judgment in the Court of Appeal, said: "I will take the liberty of making an observation as regards a maxim quoted by Mr. Christie, and which is to be found, I believe, in a great many text-books, and, I am afraid, also in a great many judgments of ancient date, and that is that a grant, if there is any difficulty or obscurity in its meaning, is to be read most strongly against the grantor. I do not see how, according to the now established rules of construction as settled by the House of Lords in the well known case of Grey v. Pearson, 6 H. L. C. 61, followed by Roddy v. Fitzgerald, 6 H. L. C. 823, and Abbot v. Middleton, 7 H. L. C. 68, that maxim can be considered as having any force at the present day. The rule is to find out the meaning of the instrument according to the ordinary and proper rules of construction. If we can thus find out its meaning, we do not want the maxim. If, on the other hand, we cannot find out its meaning, then the instrument is void for uncertainty, and in that case it may be said that

the instrument is construed in favour of the grantor, for the grant is annulled.

I have examined the cases cited by the then Master of the Rolls, and it seems to me that they justify the opinion he expresses, and I cannot find any case in which this view has since been controverted. Moreover, I have very grave doubt whether the rule ever was applied to informal written agreements made up of a series of letters and correspondence. It was applied to deeds and formal contracts, no doubt, but it seems to me that, even if it were proper to apply it to such documents, it does not necessarily follow that it would be proper to apply it to writings drawn up hurriedly and casually, such as letters and telegrams which have to be read together to constitute a contract. When there was a document which was admittedly a deed or contract whose words had to be construed, the rule was often applied, but I hardly think it was ever applied to separate detached writings so as to help in a decision whether these, along with others, constituted a contract at all or not.

Furthermore, I think this is a case, like Blackstock v. Williams, 6 W. L. R. 79, in which it is very necessary to remember the distinction between what the author of a document means to say and what is meant by the words he uses. Lord Wensleydale in Roddy v. Fitzgerald, 6 H. L. C. at p. 876, said, referring to the question of interpreting a will: "It is very often said that the intention of the testator is to be the guide, but that expression is capable of being misunderstood, and may lead to a speculation as to what the testator may be supposed to have intended to write, whereas the only and proper inquiry is, what is the meaning of that which he has actually written." In the Encyclopædia of the Laws of England, vol. 7, p. 31, it is said: "In other words, the question always is, 'What did the writer mean by that which he wrote?' not 'What did the writer mean to say?'"

In the present case, therefore, I have no concern with what the defendant meant to say, but only with what is the meaning of the words he used. I myself do not think those words mean either what the plaintiff contends for or what the defendant contends for. They mean neither of these things, simply because they do not say either the one thing or the other. The defendant said he would "give 10 per cent. discount for cash," but he did not say what the discount was to be upon. Not having said this, the words, in my view,

do not convey any meaning to the mind of the reader at all. The very fact that this dispute has arisen shews that upon reading the document a person at once asks, "Discount upon what sum?" The document furnishes no answer at all to that question. It is, therefore, in the words of Jessel, M.R., "void for uncertainty."

Something was said by counsel for the appellant as to the general understanding of such a phrase as is here in question in the parlance of land dealers, and as to the inconvenience or danger of adopting any other construction than that which he contended for. No evidence is before us as to such general understanding, and I doubt if it would have been admissible if it had been presented. For myself, moreover, I have no regret over a result which may tend to enforce some greater degree of deliberation and care in entering into important business transactions.

Mr. Biggar contended that a strict grammatical reading of the letter would shew that the offer of a discount could refer only to the whole price. Here, again, I do not think a rule of construction applicable more particularly to documents formally drawn up should be applied to a letter written by a man not much accustomed to business, and not having the necessity of strict formality of language present to his mind. In any case, even if the strict grammatical construction for which Mr. Biggar contended were the correct one, of which I am not sure, I think there is enough in the argument that a man will not probably offer a discount upon that which is to be cash in any case, to counterbalance that construction and to leave the real meaning of the document uncertain.

It seems to me further that the case is exactly covered by the decision of the House of Lords in Falck v. Williams, [1900] A. C. 176, where Lord Macnaghten said: "It is not for their Lordships to determine what is the true construction of Buck's telegram. It was the duty of the appellant as plaintiff to make out that the construction which he put on it was the true one. In that he must fail if the message was ambiguous, as their Lordships hold it to be. If the respondent had been maintaining his construction as plaintiff he would equally have failed."

I think the appeal should be dismissed with costs.

HARVEY, J.:—I agree with the opinion of my brother Stuart. I would like to add, however, that, if the offer of the defendant is capable of having a reasonable meaning given to it, the Court in construing it should apply rules of common sense in preference to strict rules of grammar, if they are inconsistent, especially in view of the circumstances of the case which relate to an ordinary real estate transaction.

The discount offered is a bonus for the immediate payment in cash of moneys which by the terms of the offer may be deferred to a later time. Why then should that bonus be applied to any moneys except those the payment of which may be deferred? In any event, half must be paid in cash. The other half bears a rate of interest of 5 per cent. for 6 months, or 2½ per cent. of the sum; consequently the rate of discount really conceded on that half is 12½ per cent., instead of the 10 per cent. stated, and, if the half required in cash be included, it makes the rate of discount on the deferred payment actually 22½ per cent. This conclusion appears to me quite unreasonable. And if I were to construe the offer, I would not interpret it as the plaintiff has done.

I agree that the appeal should be dismissed with costs.

BECK, J.:—It seems to me, in view of the other documents used in evidence and the course adopted at the trial, that it must be taken as admitted that the plaintiff accepted the defendant's offer in a sense not intended by the defendant—that is to say, the defendant's intention was not that, in case the plaintiff proposed to pay the whole purchase price in cash, the discount of 10 per cent. should be made from the entire price, but only that it should be made from that part of the price the payment of which would otherwise be deferred. This being the case, there was no consensus ad idem.

Notwithstanding that there may be in fact no consensus ad idem, a binding contract may nevertheless arise by correspondence between the parties, but only if the plaintiff affirmatively satisfies the Court that his communication was so clear and unambiguous that the defendant cannot be heard to say that he misunderstood it: Falck v. Williams, [1900]. A. C. 176.

The offer in the present case is, in my opinion, ambiguous —it might not unreasonably be taken to mean either what the defendant says was intended or what the plaintiff says he has a right to insist that it means.

Other considerations are applicable to the case of instructions from a principal to an agent and to analogous cases: Hand v. Livingston, L. R. 5 H. L. 395; Miles v. Haglehurst, 12 Com. Cas. 84.

Again, other considerations may be applicable to the construction of a contract admittedly binding upon the parties.

I think the appeal should be dismissed with costs.

ALBERTA.

JANUARY 18TH, 1910.

FULL COURT.

TROTTER AND DOUGLAS v. CALGARY FIRE INSURANCE CO.

Fire Insurance—Sale of Property Insured—Property Passing—Terms of Contract—Insurable Interest—Statutory Conditions—Change Material to the Risk—Notice to Agent—Fire Occurring Shortly after Change—Assignment without Permission—Rights of Assignee—Authority of Adjuster—Estoppel—Subrogation—Proofs of Loss.

Appeal by the plaintiffs from the judgment of BECK, J., 10 W. L. R. 267, dismissing the action.

Stanley L. Jones, for the plaintiffs.

C. T. Jones, for the defendants.

The judgment of the Court (SIFTON, C.J., HARVEY and STUART, JJ.), was delivered by

HARVEY, J.:—The plaintiff Trotter, who was a shoe merchant in Calgary, entered into an agreement with his co-plaintiff Douglas to sell to him his lease and goodwill, stock-in-trade, and fixtures. The agreement was put in writing and dated the 11th February, 1908, but, as it was necessary to take stock to fix the sale price, it was not signed till the 19th February, the stock then having been taken and the price ascertained as $14,048.94, and the purchaser on the next day went into possession.

There were 6 insurance policies covering the goods sold, amounting to $15,000, of which one for $2,000 was issued by the defendants. On the day following the signing of the contract, the vendor, in pursuance of an arrangement with his co-plaintiff, took all of these policies to have the consent of the insurers to the assignment indorsed on them. The purpose was accomplished with all but the policy of the defendants, whose manager was not in his office on any of the several occasions when the vendor called, being engaged on that and subsequent days at Court, where he was serving as a juror, and consequently no consent of the defendants was obtained.

In one policy which is before us the form taken in giving his consent is as follows. The printed form of assignment and consent indorsed on the policy is filled in and reads as follows: "For value received I hereby transfer, assign, and set over unto J. B. Douglas of Calgary, Alta., the ——— of the insured property, all my right, title, and interest in this policy of insurance and all benefits and advantages to be derived therefrom. Dated February 15th, 1908. Ralph W. Trotter, assured."

"The Western Canada Fire Insurance Company Limited hereby consents to the above assignment, subject, however, to all the conditions and stipulations contained herein or indorsed hereon. Dated February 20th, 1908. J. E. Rice, managing director."

In addition, a slip was attached with the following words: "At the request of the assured, this policy is hereby made payable in case of loss to Mr. R. W. Trotter as his interest may appear. Dated February 20th, 1909. J. E. Rice, managing director."

The evidence indicates that the other policies were dealt with in the same manner.

On the following day, viz., on the 21st February, 1908, the goods in question were destroyed or injured by fire. Three days later, on the 24th February, the plaintiffs' solicitors sent the defendants a letter in the following terms:—

"The Calgary Fire Insurance Co.,

"Calgary, Alta.,

"Dear Sirs:—In respect to a policy of insurance on the stock of Mr. R. W. Trotter, which was sold by him to Mr. J. B. Douglas, we beg to notify you of a loss by fire on Friday the 21st February, 1908, and would give you particulars of

the policy herewith except that it is locked up in a safe upon the premises. Will you kindly have your adjuster on the ground at the earliest possible date, as we believe the salvage (if any) will depreciate by delay.

"Yours truly,

"Lent & Jones."

Letters were sent to the other companies in similar terms, and shortly after, the exact time not appearing, a Mr. Lilly appeared, who stated that he represented the other 5 companies, and shortly after a Mr. Patterson appeared and stated that he represented the defendant company, but repudiated any liability, by reason of the policy not being assigned. These two gentlemen acted together, and they finally, after considerable discussion with the plaintiffs' solicitors and others, appraised the total loss at $9,500, apportioning the amount among the different companies, the defendants' share being $1,307.90. The defendants' manager states that Mr. Patterson, who had adjusted all the losses in Calgary for years, happened to be in town, and he employed him as a detective to investigate the conditions of the fire, and not otherwise. There is no doubt that he acted as an adjuster, and that both Mr. Lilly and the plaintiffs' solicitor supposed he was an adjuster. In view of the plaintiffs' request to have an adjuster appointed, and the appearance of Mr. Patterson, a well known adjuster, as representing the defendants, by their authority, I think that, in so far as it may be material whether he had the authority of an adjuster for the defendants, the defendants are clearly estopped from denying such authority.

As I have intimated, the first denial of liability was on the ground that the defendants had not consented to the assignment of the property insured and of the policy, as required by the 4th statutory condition of the policy. While still relying chiefly on this objection, they set up as further defences the 3rd statutory condition, which requires prompt notification of any change material to the risk, and the 13th and 17th conditions, which provide that no action shall be brought till 60 days after proof of loss has been given in the manner prescribed.

The learned trial Judge was of opinion that the first objection was fatal; that, by the sale, the property in the insured chattels had passed to Douglas; and that Trotter

thenceforward had no insurable interest, and the policy therefore became void; and dismissed the action.

It is a little interesting, though not material, to note that in all the other policies the companies recognised an insurable interest in Trotter by making the loss payable to him "as his interest may appear," and several have paid without suit, and one has had judgment given against it.

The conditions in question are the same as are in force in Ontario, and the decisions there are, therefore, applicable. It seems quite clear, under the terms of the 4th condition, and on these decisions, that the only assignment contemplated by the condition is an absolute one, leaving no insurable interest in the insured. In McQueen v. Phœnix Mutual Fire Insurance Co., 4 S. C. R. 660, at p. 688, Henry, J., referring to this condition, says: "Where the whole interest in insured property is assigned, a case arises wherein it is necessary to obtain the assent of the company, the object being, as the seller's interest in the property will be terminable by a sale and transfer, to enable the purchaser to get the benefit of the unexpired term, and in case of loss to recover the insurance." Such, then, I take to be the object and intention of the condition in question annexed to policies.

The assignment contemplated I take to be one by which the assignor divests himself of all title and interest. The words are, "if the property is assigned"—which means "wholly transferred."

What constitutes an insurable interest seems somewhat hard of definition. It is quite clear that it does not necessarily involve any property rights. Not merely has a mere bailee of property such an interest, but an insurance company carrying a risk has such an interest permitting it to re-insure. In Wilson v. Jones, L. R. 2 Ex. 150, Lord Blackburn said: "I know no better definition of an interest in an event than that by Lawrence, J., that, if the event happens, the party will gain an advantage; if it is frustrated, he will suffer a loss."

The proper attitude of the Court in determining whether an insured has an insurable interest is indicated by Lord Esher, M.R., in Inglis v. Stock, 10 App. Cas. 274, where he says: "It is the duty of a Court always to lean in favour of an insurable interest, if possible, for, after underwriters have received the premium, the objection that there was no insurable interest is often as nearly as possible a technical

objection, and one which has no real merit as between the assured and insurer."

In the case at bar the evidence shews that the terms of payment by weekly instalments were fixed as they were so that the purchaser could make them out of sales of the goods sold, since he had no other available assets; that the solicitor who acted for both parties intended to preserve an interest in the goods in the vendor until the whole purchase price was paid; and that it was proposed that a bill of sale should be given with a mortgage back, and that the reason this was not done was because the purchaser feared it would injure his financial standing to have a mortgage registered against him.

If this evidence were at variance with the terms of the written document, it perhaps would not be permissible to consider it, but it appears to me that it is not inconsistent with the effect of the document.

The document purports to be an agreement for sale, and it is somewhat singular that neither in the argument on appeal nor at any former time has any attention been called to the fact that it contains no words of transfer of the stock-in-trade. It recites the agreement for sale of the goodwill, stock-in-trade, and fixtures, and the interest in a certain leasing and letting of the premises, and continues:—

"Now, therefore, this indenture witnesseth as follows, that the vendor doth hereby assign, transfer, and set over to the purchaser all his right, title, and interest in the leasing and letting . . . together with the goodwill in the said trade of shoe merchant heretofore carried on by him, the said vendor, in consideration of the purchaser paying to him the sum of 50 cents on the dollar of the cost price in the store for all and singular the fixtures . . . and in further consideration of the purchaser paying to the said vendor the rate of 90 cents on the dollar of the cost in the store of all the stock-in-trade. . . ."

Provision is then made for taking stock and for the terms of payment. Other provisions follow, including one for the apportionment of taxes, insurance premiums, etc., which continues as follows: "But it is expressly understood and agreed that the insurance shall remain in the name of the vendor, with loss, if any, payable to him, as his interest may appear, and, in event of loss, the amount received by the vendor in respect to insurance shall be credited upon the

purchase price remaining due by the purchaser to the said vendor, and any balance, if any, refunded to the purchaser."

The following further clauses appear:—

"The purchaser shall take possession of the said stock-in-trade, fixtures, and the store premises, immediately upon payment of the said sum of $2,000 on account of the said purchase money, and forthwith after completion of the said stocktaking.

"For the purpose of greater certainty, it is understood that the goodwill and delivery up of the premises by the vendor is embraced and comprised in the consideration of the said 90 cents on the dollar of the stock . . . and 50 cents on the dollar for fixtures."

These are the only portions of the agreement which appear to have any bearing on the question of the intention of the parties as to the assignment of the property insured.

Whether the omission of the words "stock-in-trade" from the operative part was deliberate or accidental, or whether some clause of qualified assignment was intended to be inserted, does not appear, and, in the absence of express words of assignment, the implication from the extrinsic evidence and the other terms of the agreement, or indeed even from the latter alone, to my mind, is, that the interest in the stock-in-trade to be assigned was not the whole interest, but that the parties intended to leave in the vendor at least such interest as would enable him to protect himself in respect of the unpaid purchase money.

It is evident, then, from the citation I have made from McQueen v. Phœnix Mutual Fire Insurance Co., that the assignment was not one coming within the condition, and the consent of the insurance company would be necessary only to make it directly liable to the purchaser without the intervention of the vendor. If the purchase money had been all paid before the fire, then the vendor's interest would have ceased, and the policy would have ceased to have effect, but the vendor's interest continued so long as any of the purchase money remained unpaid, and the policy remained valid for his benefit. Some evidence was given at the trial to shew that the amount still unpaid is less than the claim in this action; and the defendants claim to be subrogated. In view of the clause regarding insurance in the agreement, the case

of Keefer v. Phœnix Insurance Co., 31 S. C. R. 144, is a clear authority that this claim cannot be given effect to.

The next defence is that under the 3rd condition, which requires notice of any change material to the risk to be promptly notified in writing to the company or its local agent.

To my mind, there are two valid answers to this defence, on the authorities. First, the condition does not apply, for there is no change material to the risk. There is no doubt that it is not the ordinary case of a greater risk by reason of change in the physical condition of the property or something connected with it, but it would appear that, if the moral risk is to be considered, the acquiring of an interest by another person might be considered a change material to the risk, but the effect of Keefer v. Phœnix Insurance Co. seems to be otherwise.

The first condition provides that, if any person insuring omits to communicate any circumstance which is material to be made known to the company in order to enable it to judge of the risk it undertakes, such insurance shall be of no force. In that case, as the facts appear from the report of the judgment of the trial Judge, 29 O. R. 394, the party insuring had, before the insurance, sold the property for $2,000, of which he had received $800 before the insurance and $1,300 before the fire. The company knew nothing about the sale or the fact that any one but the insured had any interest in the property until the day before the fire, but it was held that the policy was valid.

In the Supreme Court report, at p. 150, Sedgewick, J., whose judgment was concurred in by the Chief Justice, says: "Some of the learned Judges below seem to have thought that the fact that Clay's interest was not disclosed at the time of the insurance vitiated the policy. The authorities are conclusively the other way." It appears perfectly clear that if the fact of there being a purchaser with a large beneficial interest at the time of the insurance is not material to the risk so as to require to be made known, the acquiring of such an interest subsequently is not a change material to the risk so as to require it to be made known.

But, secondly, even if the change were one which the insured was required to notify promptly to the company, I think, under the circumstances of this case, any want of notification should be excused by reason of the fire having

happened so soon after the change, especially coupled with the fact that the vendor tried to find the defendants' manager several times the day after the change, for the purpose, not simply of notifying the company as he would have done in writing by the necessary indorsement on the policy, but of getting its consent to the assignment of the property and the policy.

A notification after the fire would appear to be valueless, and, therefore, unnecessary, but, as far as time is concerned, the letter from the plaintiffs' solicitors which notified the defendants of both the assignment and the loss, and was only 5 days after the signing of the agreement, would appear to be reasonably prompt, and, if no fire had occurred in the meantime, would undoubtedly have been quite sufficient to satisfy the condition.

The only other defence to consider is that relating to the failure to furnish the proofs of loss prescribed by the conditions of the policy.

In Morrow v. Lancashire Insurance Co., 26 A. R. 173, the Court held that the company, by denying liability on the policy, had estopped itself from insisting on strict compliance with its requirements as to proofs of loss. We have been referred to Bell v. Hudson's Bay Insurance Co., 11 W. L. R. 633, 2 Sask. L. R. 355, in which Mr. Chief Justice Wetmore refused to hold the company liable, no notice of loss having been given. The learned Judge in that case, however, points out the distinction between notice of loss and proofs of loss. In the present case the notice has been given, while it was absent in that case. Proofs of loss were prepared in the usual form, and in the case of the other companies were left with their adjuster at his suggestion, and, as I have already intimated, several of the companies paid without question. A copy of the documents proving the loss was left for Mr. Patterson, who purported to be acting as an adjuster for the defendant company, the plaintiffs' solicitors having been given to understand that he would receive it in that way, and, as soon as he returned to town, it was intended to furnish him with originals. Nothing further appears to have been done about it, no doubt because of the company's continued repudiation of liability. Apart from the authority of the case I have just cited, sec. 2 of the Fire Insurance Policy Ordinance, No. 16 of 1903, 1st. session, gives ample authority to dispense with those requirements of the policy.

There is no doubt about the loss, the amount has been carefully ascertained, and the defendants' manager in his examination states that he raises no question as to the cause of the fire. No useful purpose could, therefore, be served by the preparation of formal documents which would add no information.

It would clearly be inequitable, under these circumstances, to permit the company to escape liability, and the section mentioned gives power to the Court to disallow such an objection, under such circumstances.

For the reasons I have stated, I think all of the defences fail, and the plaintiffs are entitled to succeed.

The appeal should be allowed with costs and the judgment in the Court below in favour of the defendants set aside, and judgment entered for the plaintiffs for $1,307.90, with interest from the 3rd June, 1908, and costs.

ALBERTA.

JANUARY 18TH, 1910.

FULL COURT.

ONSUM v. HUNT.

Principal and Agent—Agent's Commission on Exchange of Properties Negotiated for Principal—Exchange Effected with Agent's Partner—Position of Agent Incompatible with Duty to Principal.

Appeal by the defendant from the judgment of NOEL, Dist. Ct. J., in favour of the plaintiff, in an action for a commission in respect of an exchange of properties negotiated by the plaintiff as agent for the defendant, as alleged.

W. T. D. Lathwell, for the defendant.

J. Burnett, for the plaintiff.

The judgment of the Court (SIFTON, C.J., HARVEY, STUART, and BECK, JJ.), was delivered by

HARVEY, J.:—The defendant was the owner of an interest in two parcels of land, subject to the rights of purchasers under contracts for sale. He desired to sell his interests in the lands and in the contracts, and, having met one Rusk, a real estate agent, he was introduced by him to the plaintiff, also a real estate agent, and thereupon the following document was drawn up by Rusk and signed by the defendant: "Innisfail, April 9th, 1908. Authority to sell or trade by W. W. Hunt, of Harmatton, the following property, mortgage and contract on following lands, N. E. ¼ 36-32-4-5 and the N. H. 31-32-3-5, amounting to $4,000. Contract on N. H. 31-32-3-5 due March, 1909, $1,000. Second payment March, 1911, $1,000. Commission 5 per cent. on amount of deal to be paid to J. A. Rusk or T. G. Onsum. (Sgd.) W. W. Hunt."

Some months later an exchange was effected between the defendant and Rusk of the interest in the N. E. ¼ of 36 for 40 acres situate in the State of Missouri owned by Rusk. In respect of this exchange the plaintiff claims a commission of 5 per cent. on $2,650, which amount he states was the amount of principal and interest due to the defendant on his contract. At the time of the exchange the defendant offered some objection to paying a commission, and he alleged in his statement of defence and stated at the trial that the claim for commission was waived, in consideration of the defendant giving the plaintiff the exclusive right for 3 months to sell the Missouri property, which he is admitted to have done. Noel, Dist. Ct. J., who tried the case, found against the defendant on this defence, and gave judgment for the plaintiff.

In my opinion, the plaintiff never acquired any right to a commission, and consequently there was nothing to be waived.

The relationship existing between a vendor and his agent for sale is that existing between any principal and his agent, which involves the duty on the part of the agent of advancing his principal's interest. It is stated in 31 Cyc., p. 1430, that "the relation of an agent to his principal is ordinarily that of a fiduciary, and as such it is his duty to act with entire good faith and loyalty for the furtherance and advancement of the interests of his principal in all dealings concerning or affecting the subject matter of his agency." And on the following page it is pointed out that, if the agent, without the full knowledge and consent of the principal, represents in-

terests adverse to those of the principal, the principal, upon hearing the facts, may repudiate the transaction or may adopt it, and make the agent account for any profits made by the agent. At p. 1437 it is stated that an agent for sale may not himself buy, without the principal's full knowledge and consent, owing to the conflict of interest which would arise.

In Salomons v. Pender, 34 L. J. Ex. 95, the plaintiff was employed to sell some land. He, with two others, promoted a company, and his co-promoters, through him, entered into an agreement to purchase the land, which agreement was subsequently carried out by the company which was formed, of which the plaintiff became a shareholder. The Court held that the plaintiff was not entitled to any commission on the sale. Pollock, C.B., said: "I think a man cannot charge commission for a sale in which he himself is the buyer." Bramwell, B., points out that, even though his interest in the land may be less than his commission would be, he cannot recover, because his authorisation is to find a third person as purchaser. Martin, B., accepts this view, but points out also that he could not recover as an agent, because he had taken upon himself a position incompatible with the duty of an agent.

It is quite apparent, on the authority of this case, that Rusk could not have collected a commission, and it is doubtful whether, under any circumstances, the plaintiff could on a sale to Rusk.

The evidence does not disclose with any clearness what efforts the plaintiff made on his principal's behalf, or whether the exchange was really effected through any efforts of his. It is quite true that he did write a letter to the defendant calling his attention to the land which was accepted in exchange, but it is also clear that he knew nothing personally about this property, and his information was obtained from Rusk, though the description was given by him as if from his own knowledge, and there was no intimation that Rusk was in any way interested. The defendant states that the land was misrepresented to him. Rusk undoubtedly introduced the defendant to the plaintiff, and, though he was a witness on the plaintiff's behalf, there is nothing in his evidence that furnishes any indication that the exchange was effected by the plaintiff. What, to my mind, is more important, however, is the relation existing between the plaintiff and Rusk at and subsequent to the time the authority to

sell was given. At the time of the trial it was admitted that they were partners, though both denied that they were partners when the authority was given. The defendant, however, says they told him they were partners, and this is not denied. Rusk also says that he was using the plaintiff's office, and the plaintiff was using his team, and, if one sold any property on the other's list, he was to get the commission, and, if they sold together, they were to divide the commission. It is quite evident that there was some community of interest between these parties, and, on the explanation of Rusk, it would appear that he would be entitled to half the commission that the plaintiff might get in this case. This in itself would disentitle the plaintiff to any commission, since Rusk would not be entitled to any. But, apart from that, it appears to me that the plaintiff is disentitled to any commission on the general principal as expressed by Martin, B., in the case cited, that he had taken upon himself a position incompatible with his duty as an agent of his principal, and was really serving the interest of Rusk rather than that of his principal; and I think, therefore, that the appeal should be allowed with costs, except the costs of preparing the appeal books, which are illegibly typewritten, and the judgment in favour of the plaintiff set aside and judgment entered in the Court below for the defendant, with costs.

ALBERTA.

SCOTT, J. JANUARY 19TH, 1910.

SINGLE COURT.

RE THROSSEL.

Distribution of Estates — Intestate Estate of Person Domiciled in Alberta — Right of Child Adopted in Foreign State to Share in Estate—Law of Country where Status Originated—Private International Law.

Application, under sec. 48 of the Trustee Ordinance, by Ellen Throssel, the widow and administratrix of the estate of

William Throssel, deceased, for an order determining a question arising in the administration of the estate.

E. D. H. Wilkins, for the applicant.

R. D. Tighe, for Etta Mary Reid.

SCOTT, J.:—The deceased, who at the time of his death and for some years prior thereto was domiciled in this province, died intestate and without issue, but while domiciled in the State of Iowa he had there adopted as his child one Etta Mary Reid.

It is admitted that she was legally adopted under the laws of that State, and that, by reason thereof, she would be entitled in that State to the same rights as if she were a legitimate child of the deceased.

The question upon which the opinion of the Court is asked is whether she, as such adopted child, is entitled to share in the distribution of the estate of the deceased situated in this province.

It appears to be well settled, and in fact it was admitted by counsel for Etta Mary Reid upon the argument, that in England a child adopted by a person domiciled there is not so entitled, but the question whether a child adopted by a person domiciled in a foreign State by the laws of which it would be entitled to share in the distribution of his estate in that State, would be so entitled in respect of his estate in England, does not appear to have yet been expressly decided.

In the United States it appears to be settled law that such adoption in a State will be recognised by the Courts of the other States of the Union in which similar laws respecting the effect of such adoption are in force, but whether it would be so recognised by the Courts of those States in which similar laws are not in force, is a question upon which there does not appear to be any authority. (See Wharton on Conflict of Laws, 3rd ed., vol. 1, pp. 568-9).

Re Goodman's Trusts, 17 Ch. D. 266, has some bearing upon the question. In that case it was held by the Court of Appeal that a child born before wedlock of parents who were at her birth domiciled in Holland, but legitimated according to the laws of that country by the subsequent marriage of the parents, was entitled to share in the personal estate in England of a person domiciled there, as one of her next of kin under the Statute of Distributions. The decision in that case appears to rest upon the ground that the principles of private

international law must govern, and that the status of a claimant must be tried and settled by the law of the country where that status originated.

A number of cases are referred to in that case as supporting that proposition. It is true that they all were cases relating to the effect of the legitimation of chilren by the laws of a foreign state by the subsequent marriage of their parents, but, in my view, the principle laid down by those cases applies with equal force to cases where an adopted child is given by the laws of a foreign state the same rights and privileges as that of a legitimate child.

In his judgment in Re Goodman's Trusts, James, L.J., says, at p. 296: "We have in this country from all time refused to recognise legitimation of issue by the subsequent marriage of the parents. . . . But the question is, what is the rule which the English law adopts and applies to a non-English child? This is a question of international comity and international law. According to that law as recognised, and that comity as practised, in all other civilized communities, the status of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin—the law under which he was born."

In Nelson on International Law, p. 49, the author, referring to that case and other authorities, states as follows: "And if a person were adopted in and according to the law of the country of his own domicile at the time of the act, the act of adoption and its consequences would probably be recognised here." Also, at the same page, the author quotes from a judgment in Dalrymple v. Dalrymple, 2 Hagg. Con., as follows: "The cause, being adjudicated in an English Court, must be adjudicated according to the principles of the English law, but the only principle applicable to such a case by the law of England is that the status or condition of the claimant must be tried by reference to the law of the country where the status originated."

Savigny in his Treatise upon International Law, at p. 317, quotes as follows from Heffter, a German writer on that branch of the law: "Every legal relation which has sprung up under the sanction of a competent state is an accomplished fact for every one; only no state is thereby obliged to allow to that fact the same effects as that state allows or determines. Each may fix, by positive law, the consequences of the particular relations within its own territory at its own discretion.

If, however, it does not lay down such a positive rule, it is assumed that it intends a legal relation originating abroad to have its original force and effect."

In Foote on International Law mention is made, at p. 93, of the fact that the editor of the last edition of Story disapproves of the decision in Re Goodman's Trusts, on (among other grounds) the ground that it would follow that adopted children would have the same rights as legitimated children. The author then proceeds to draw a distinction between those two classes by asserting that adoption is not a status.

I cannot see any ground for this distinction. Under the English law neither class has any status. Each may have a status in a foreign country, and if, by the principles of international law, the status of one class under the foreign law is recognised in England, I see no reason why that of the other should not be given effect to.

In Phillimore's International Law, vol. 4, at p. 385, the following is stated: "Adoption, arrogation, and emancipation are legal relations founded on the Roman, and unknown to the English, law; but whatever consequences affecting the status flow from them, according to the personal status or law of the domicile, ought to be recognised in other countries, subject always to the general rule which has already been mentioned." The general rule referred to is that, as to immobilia, the lex loci rei sitæ must govern; but, as, by sec. 5 of the Land Titles Act, real estate must here be distributed as personal estate, the exception does not appear to me to be material in this case.

In the light of the authorities to which I have referred, I think that the reasonable conclusion is that the status of Etta Mary Reid as an adopted child under the law of Iowa should be given effect to here, and I therefore hold that she is entitled to share in the distribution of the estate of the deceased in this province, to the same extent as if she were a legitimate child of the deceased.

The costs of the administratrix and of Etta Mary Reid will be paid out of the estate of the deceased.

NORTH-WEST TERRITORIES.

WETMORE, J. JUNE 6TH, 1904.

CHAMBERS.

RE SOLICITORS.

Sheriff—Fees — Fi. Fa. Lands — Certificate Forwarded to Registrar of Land Titles without Special Request—Land Titles Act, secs. 92, 93—Judicature Ordinance, Rule 368 —Registrar's Fees—Liability of Advocate of Execution Creditor.

Application by the solicitors for a review of the taxation of a sheriff's bill of fees against the applicants.

J. T. Brown, for the applicants.

The sheriff, in person.

WETMORE, J.:—Two executions were issued and placed in the sheriff's hands in Gilmour v. Griffis, one against goods and one against lands, upon the same judgment. The money was made on the execution against goods. In Maw & Co v. Pinkie, two executions, one against goods and the other against lands, were issued in like manner and placed in the sheriff's hands. The money was paid to the advocates, who notified the plaintiff. The sheriff had in both cases sent to the registrar of land titles a certified copy of the writ against lands, under sec. 92 of the Land Titles Act, as enacted by sec. 3 of ch. 21 of the Acts of 1900. In neither case was the sheriff requested by the advocates for the execution creditors, or any person acting for the execution creditors, to forward this certificate, and this is the ground on which the clerk's taxation is disputed.

Rule 368 of the Judicature Ordinance provides that if the amount authorised to be made under the writ against goods is made and levied thereunder, the person issuing the writ against lands shall not be entitled to the expenses thereof or of any seizure or advertisement under it, and the officer having the execution of the writ against lands must return that the amonut has been so made and levied. By virtue of that Rule, therefore, the execution against lands in Gilmour

v. Griffis was satisfied, so, by the act of the advocate in accepting the money in Maw & Co. v. Pinkie, the execution against lands was also satisfied. It was, therefore, the clear duty of the sheriff to forward to the registrar the certificate as required by the Act of 1900. That duty was cast upon the sheriff by that Act to ensure that the cloud registered against the execution debtor's land should be removed, and that he, having satisfied the execution, should not have to be put to the trouble and expense of having that cloud removed, and this is quite in accordance with the rule I have cited. The intention is that the judgment debtor is not to be harassed with the costs and expenses of a writ against his lands, when one against his goods will serve the purpose. If the execution debtor would have to wait until the advocates of the execution creditor removed the cloud, he might have to wait some time, and Parliament therefore cast the duty upon the sheriff.

Now, has the sheriff to do this at his own expense and pay the registrar too? For the registrar is entitled to a fee of 50 cents. See Consolidated Orders in Council, p. 938, item 17. The contention however is that, as the substituted sec. 93 of the Land Titles Act provides for no fee, the sheriff and registrar are to perform the services therein required for nothing, unless the sheriff is requested by the execution creditor or his advocate to forward the certificate therein provided for; and great stress is put on the fact that sec. 92 of the Act specially provides for a fee to the sheriff for forwarding the certified copy of execution. This suggestion does not impress itself on my mind very strongly. The provision for a fee in that case was intended to protect the sheriff so as to make it clear that he was not compelled to forward the certified copy of the writ unless the party in whose interest it was done paid him for it, and the party in whose interest it was done was the execution creditor, the party who sets the sheriff in motion. In so far as the certificate under sec. 93 is concerned, the party who set the sheriff in motion would, as a rule, be quite indifferent and probably not very eager to advance the requisite fee. So the Act cast the duty upon the sheriff. But it never intended that he was to perform the same for nothing. There was as a rule no necessity to provide for a fee, because the sheriff, having realised the money under the fi. fa. goods, could take his fee out of these moneys before he paid them over. The execution creditor or his advocate set the sheriff in motion, and the advocate is liable for what-

ever the sheriff had to do in execution with or on account of the writ. Under Rule 368 the sheriff has to make a return to the execution against lands. He is entitled to a fee for every return. Could it be successfully contended that he would not be entitled to be paid for that return by the execution creditor? He certainly could not get it from the execution debtor . I have no doubt that the advocate of the execution creditor would be liable, and so the sheriff is entitled to a fee for every certificate required—if under seal, $1, if not under seal, 50c. See tariff of sheriffs' fees, items 195 and 196. Now he is entitled to that fee whether required by special request or by the law. If by special request, the party requiring it has to pay; if by law, then the party who set the machinery going out of which the law required it to be done must pay.

Taxation affirmed.

SASKATCHEWAN.

JOHNSTONE, J. JANUARY 2ND, 1910.

TRIAL.

MAYBERY v. WILLIAMS.

Vendor and Purchaser—Contract for Sale of Land—Action by Vendor for Purchase Money—Vendor Acquiring Legal Title before Action—Vendor Equitably Entitled when Contract made—Delivery of Abstract—Condition Precedent—Incumbrances—Practice—Defendant not Appearing—Judgment against, at Trial.

Action to recover a balance of purchase money of land.

W. B. Willoughby, for the plaintiff.

G. E. Taylor, for the defendants.

JOHNSTONE, J.:—The plaintiff in his statement of claim alleges, as was the fact, that by agreement in writing signed by the plaintiff and the defendants, dated the 6th May, 1907, the defendants agreed to purchase from the plaintiff certain

lands, namely: lots 1 to 16 in block 11; lots 1 to 16 in block 12; lots 1 to 16 in block 13; and lots 1 to 16 in block 14—all in Lynbrook Heights addition to the city of Moose Jaw—for the sum of $3,420, payable as follows: $500 on or before the 6th May, 1907, $355 on or before the 1st June, 1907, $855 on or before the 6th September, 1907, $855 on or before the 6th January, 1908, and $855 on or before the 6th May, 1908; and the defendants in and by such agreement covenanted with the plaintiff to pay him the said several sums of money on the days and times mentioned, together with interest at the rate of 8 per cent. per annum on the purchase money remaining unpaid from time to time, payable on the 6th days of September, January, and May in each and every year, and at the rate of 10 per cent. per annum from the date each instalment of purchase money remained in arrear.

The defendants paid on account of such purchase money on the 6th May, 1907, the sum of $500, and on the 7th January, 1908, a further sum of $177.50.

The defendants in their defence set up: (1) that they never entered into any such agreement; (2) fraud; (3) that the plaintiff never was the owner thereof or entitled to any interest in the lands in question; (4) that the lands in question were incumbered in a sum greater than the amount of the plaintiff's claim, and the plaintiff could not make title; (5) that it was a condition precedent to the right of the plaintiff to recover, that he should deliver to the defendants an abstract of title, and prove and shew his title to the lands in question, and that he neglected and refused to do so, and the plaintiff thereby became discharged.

The defences set up by paragraphs 4 and 5 of the statement of defence are the only defences worthy of consideration, and even as to these the defendants utterly failed. There was never a demand made for an abstract, and the plaintiff, long prior to the bringing of this action, obtained his certificate of title to the lands in question, namely, on the 22nd January, 1908, under an agreement for sale thereof to him in writing, with the owners in fee, of the 23rd March, 1907.

The covenant in the agreement first referred to is in these words: "Now it is hereby agreed between the parties aforesaid in the manner following, that is to say, the purchasers covenant, promise, and agree to and with the said vendor that

the purchasers will well and truly pay or cause to be paid to the said vendor the said sums of money, together with interest thereon at the rate aforesaid, on the days and times and in the manner above mentioned."

And it was further provided that, in consideration of the payment of said sums of money with interest in the manner aforesaid, the vendor should convey and assure or cause to be conveyed or assured to the purchasers the said lands, by deed or transfer, subject only to the conditions and reservations of the original grant from the Crown.

The covenants entered into by the said first mentioned agreement between the vendor and the purchasers were independent covenants, and at law the latter would have no defence to an action on their covenant for an overdue instalment, but where the action is brought, as in this case, for the recovery of instalments past due before the time for completion had arrived, the vendor would be entitled to judgment unless an equitable ground of relief were shewn, as, for instance, the existence of incumbrances or some defect in the title.

I agree with the judgment of Chief Justice Howell in Hartt v. Wishard Langan Co., 9 W. L. R. 519, at p. 533, where he says: "No doubt, the plaintiff's legal rights were, immediately upon the execution of this agreement, to demand an abstract of title, for, although payments were to be made in the future, and conveyances were not to be executed until the payments were made, yet he had at once a right to look into the title to see what the defendants' title was, and to find if they had such title as would justify him in continuing the contract. . . . If the plaintiff had demanded such an abstract, and that abstract had shewn that the defendants either had a title in fee simple free from incumbrances before the time limited for conveyance by him, then the abstract would have exhibited a good title. The only title then required to be shewn by the vendors would be a right to enforce a title or a right to compel other people to join with him in a conveyance—in other words, a right to have a perfect title by the time he is called upon to convey:"

In re Baker, [1907] 1 Ch. 240, is referred to.

The plaintiff in this case was, when called upon by the agreement named, upon payment by the purchasers of all instalments of purchase money and interest, in a position to convey.

In his argument Mr. Taylor referred to Cameron v. Carter, 9 O. R. 426, in which the judgment of Esten, V.-C., in Gamble v. Gummerson, 9 Gr. 193, was approved. In the case referred to it was held that where an estate is generally offered for sale, the purchaser has the right to assume that the title is good, and that it is free from incumbrance, and he has a right to require this to be shewn before he can be compelled to pay any part of his purchase money. I do not think this statement of the law has any application to the case before me. As I have already said, the defendants never requested the delivery of an abstract. There was never any objection raised by them to the plaintiff's title, and no steps were taken to rescind, and it was only at the trial that the defence, under paragraph 5 for the first time was raised, and then only by leave given on notice of motion in that behalf. No doubt, the defendants would have been entitled to have had an abstract, but any relief to which they would be entitled would have to be granted under the equitable jurisdiction of the Court, and there were no existing equities by reason of which the defendants could claim equitable relief.

Lord Justice Cotton in In re Bryant and Barningham's Contract, 44 Ch. D. 223, said: "I do not doubt that, if a defendant is able to make a good title before the day fixed for the completion of the contract, the contract can be onforced."

The plaintiff, having acquired a fee simple in the lands prior to the bringing of his action, brought himself within the rule here laid down. The agreement between MacLean and Maybery produced shews that the plaintiff was, at the time the agreement of sale was entered into between him and the defendants, the equitable owner of the lands in question, with a right to get in the absolute title before he was called upon to convey to the defendants, and the defendants would, therefore, be not entitled to have the contract rescinded: Shaw v. Foster, L. R. 5 H. L. 350; Egmond v. Smith, 6 Ch. D. 476. See also In re Head's Trustees, 45 Ch. D. 310; Want v. Stallibrass, L. R. 8 Ex. 175.

Objection was taken at the trial that final judgment had not been signed against the defendant Williams, who did not enter an appearance to the action.

By an order of the local Master made in Chambers on the 8th January, 1909, it was ordered that service of the writ upon the defendant Williams might be effected by giving

notice of the writ of summons and statement of claim in 3 successive issues of the Weekly Moose Jaw News, a weekly newspaper published in the city of Moose Jaw, Sask., and that such defendant should have 30 days within which to appear; such publication to be good and sufficient service upon that defendant. At the trial it appeared that the order of the local Master had been complied with, and that the publication of the last notice took place on the 29th January, 1909, and that the defendant named had not appeared to the action.

It is not now the practice to sign final judgment where one defendant does not appear. Moreover, judgment in this case could not have been signed against the defendant, because, as is provided by Rule 22 of the Judicature Ordinance, the Rule under which the order of the local Master was made, no judgment could be entered in default of appearance until the Judge was satisfied by such proof as he might require of the justice of the claim. This proof could be given at the trial of the action.

There will be judgment for the plaintiff for such amount as may be found due by the local registrar at Moose Jaw, together with the costs of the action.

SASKATCHEWAN.

JOHNSTONE, J. JANUARY 7TH, 1910.

TRIAL.

HALL v. CITY OF MOOSE JAW.

Municipal Corporations—City By-law for Regulating and Licensing Hackmen — Powers of Council — Municipal Ordinance — Cities Act — Delegation of Authority to Issue or Refuse License to Officers of Municipality — Illegality—Restraint of Trade—Public Policy—Damages —By-law not Quashed—Action—Declaration of Invalidity —Injunction.

Action for an injunction to restrain the defendants from interfering with the plaintiff in carrying on the business of

a hackman in the city of Moose Jaw, and for damages, and for a declaration that certain by-laws of the defendants were invalid.

G. E. Taylor, for the plaintiff.

W. B. Willoughby, for the defendants.

JOHNSTONE, J.:—The defendants were incorporated a city by special Ordinance, ch. 34 of the second session of 1903. No power to pass by-laws was conferred by this Ordinance upon the city, but the Municipal Ordinance and all amendments then in force were incorporated in the special Act.

By sec. 95 of the Municipal Ordinance, sub-sec. 34, power was given to municipalities to pass by-laws for licensing hawkers, water dealers, milk dealers, carriers, or common carriers, draymen, hackmen, omnibus drivers, and guides, and regulating the same, and for fixing the sum to be paid for such licenses. By sec. 285 of the same Ordinance power was given to the council of a municipality to pass by-laws for inflicting reasonable fines and penalties, not exceeding $100 exclusive of costs, for breach of the by-laws.

On the 22nd February, 1904, the council of the city of Moose Jaw passed a by-law under sub-sec. 34, making provision for the licensing of certain callings, including hackmen, but it will be necessary to refer only to secs. 7, 8, and 17 of this by-law, which are as follows:—

"(7) No person or persons shall keep for hire or profit in the city of Moose Jaw. any cab or hack, without first having obtained a license for the same from the secretary-treasurer of the said city."

"(8) Any person or persons or company desirous of obtaining a license or transfer of a license for any calling mentioned in this by-law, shall make an application to the license and police committee of the city of Moose Jaw, stating the lots and block where the business will be conducted, said application to be accompanied with the amount of the license fee, which will be returned in case of refusal to grant said application."

"(17) That no license or transfer of license shall be granted under this by-law except upon petition by the applicant to the said chairman of the license and police committee, praying for the same, which said petition may be in

the form B to this by-law annexed, nor until the said license inspector shall have reported that the applicant is a fit and proper person to have a license; that the premises may not be less in size than 18 feet by 30 feet, with walls 14 feet in height, with provision for the proper ventilation thereof; that his vehicles, horses, harness, and other equipments are in a fit and proper condition and are suitable for the public use; and that all the conditions required by the by-laws, rules, and regulations of the said council have been complied with; which said report shall be indorsed upon the said petition, and may be in the form C to this by-law annexed."

The plaintiff became a licensee under the said by-law, and carried on business as a hackman during the year 1908, and previous thereto, within the city of Moose Jaw. His license expired, however, on the 31st December, 1908.

On the 1st March, 1909, by-law 64 was amended by by-law 357, and a new section added as 37 as follows: "Every hack driver shall take out a license, for which a fee of $1 shall be paid, but no license shall be granted to any driver unless the same has been previously recommended by the chief of police for the city, he certifying to the good conduct and ability of the applicant to fill the position of hack driver."

This amendment was passed under the Cities Act of 1908, under which legislative jurisdiction is conferred upon municipal councils by secs. 184 and 187. That portion of sec. 184 to which it is necessary to refer, confers upon councils power to make regulations and by-laws for the peace, order, good government, and welfare of the city, including regulations and by-laws respecting the issue of licenses and payment of license fees in respect of any business, provided that no such by-laws shall be contrary to the general law of the province and shall be passed bona fide in the interests of the city.

By sec. 187 the power to license shall include power to fix the fees to be paid for licenses, to specify the qualifications of the persons to whom the conditions upon which such licenses shall be granted, to regulate the manner in which any licensed business shall be carried on, to specify the fees or prices to be charged for the licenses, to impose penalties upon unlicensed persons or for breach of the conditions upon which any license has been issued or of any regulation made in relation thereto, and generally to provide for the protection of licensees.

By sec. 408 of such Act, the council may impose a penalty, not exceeding $100 exclusive of costs, for breach of any provision of any by-law.

On the 30th March, 1909, the plaintiff made application to the proper officer of the defendant corporation in that behalf for a hack license under the provisions of the said by-law 64, and, on the 19th April following, the plaintiff made application to the same officer for a driver's license under the said amendment to such by-law. Such applications were accompanied by the fees prescribed by such by-laws.

On the 13th April, 1909, the chief of police having reported against the application for a hack license, the same was afterwards refused, and the plaintiff's application for a driver's license was also refused on the 17th May, 1909. The plaintiff was notified of the refusal of his application for hack license by letter of the city clerk dated the 16th April, in these words:—

"Samuel Hall, Esq.. Moose Jaw, Sask.

"Dear Sir:—I am instructed by the council to notify you that they cannot see fit to grant you a hack license this year. Kindly therefore desist from continuing your business as a hackman, otherwise prosecution will follow.

"Yours truly,

"J. D. Simpson, city clerk."

On the 20th April, the license fees for the hack and driver's licenses respectively. $26, were returned to the plaintiff by the city clerk.

The plaintiff continued to carry on his business until the latter part of April, 1909, when he was convicted for that he did at Moose Jaw on the 21st April, 1909, unlawfully keep for hire a cab, without first having obtained a license for the same, contrary to sec. 7 of by-law 64.

On the 1st May, 1909, the plaintiff brought this suit, claiming: (1) $1,500 damages sustained by him by reason of the refusal of the defendants to allow him to continue the carrying on of his said business; (2) an injunction restraining the defendants, their servants or agents, from preventing the plaintiff from carrying on his said business or interfering with the same; (3) a declaration that the said by-laws were

illegal and invalid, or, in the alternative, a declaration that the plaintiff was entitled to a license under the said by-laws.

No application was made to quash the said by-laws or either of them. but both by-laws were and still are in force within the limits of the city of Moose Jaw, and the plaintiff before bringing this action gave no notice of action.

Our Cities Act contains a provision similar to that in force in the other provinces, namely: "In case a by-law or resolution is illegal in whole or in part, or in case anything has been done under it which by reason of such illegality gives any person a right of action, no such action shall be brought until one month has elapsed after the by-law or resolution has been quashed or repealed nor until one month's notice in writing of the intention to bring the action has been given to the city; and every such action shall be brought against the city and not against any person acting under the by-law or resolution."

Section 17 of by-law 64 and sec. 37 of by-law 357 impose upon the inspector or chief of police, as the case may be, a judicial duty. Upon the report of either of these officers depends the issue of a license. No licenses can be granted unless and until the inspector in the one case, and the chief of police in the other, has reported favourably. These officials are empowered arbitrarily to decide whether an applicant is to receive his license or not. This is clearly a delegation of authority that cannot be justified. The council has clearly delegated to these officials named the judgment and discretion that the legislature intended and expected the council should exercise.

The applicant is entitled to the consideration of his application by the whole body of the council and to have the same passed upon by such body: Regina v. Webster, 16 O. R. 187; Taylor v. City of Winnipeg, 11 Man. L. R. 420; Re Cloutier, 11 Man. L. R. 220; Re Elliott, 11 Man. L. R. 358; Merritt v. City of Toronto, 22 A. R. 205.

I think by-law 64 is bad, also, for the reason that it is prohibitive. By-laws in restraint of trade are bad as contrary to public policy. There is a great difference between prevention and regulation, and even between restraint and regulation. No man can be prevented or restrained from a lawful calling by mere inference: Regina v. Johnson, 38 U. C. R. 549, 551.

Other sub-sections of sec. 95 empower a council to pass by-laws preventing the doing of certain acts, and, if it had been the intention of the legislature to empower municipal councils to prevent the carrying on of business by any class of persons, the legislature would have conferred such power upon a council.

Chief Justice Draper in In re Davis and Town of Clifton, 8 C. P. 236, said: "The absolute prohibition of any particular occupation, not in itself unlawful, and only a nuisance from its abuse, cannot, I think, be held to come fairly within the general power to make by-laws for the peace, welfare, and good government of a municipality, when we look at the authority specially given in the same Act over particular matters, some of them so nearly of a similar character as almost to warrant the application of the maxim expressio unius est exclusio alterius."

In Virgo v. City of Toronto, [1896] A. C. 88. Lord Davey, at p. 93, draws attention to the distinction between prohibition or prevention of trade and the regulation of it, in these words: "No doubt, the regulation and governance of a trade may involve the imposition of restrictions upon its exercise, both as to time, and also, to a certain extent, as to place, where such restrictions are, in the opinion of the public authority, necessary to prevent a nuisance or for the maintenance of order. But . . . there is a marked distinction to be drawn between the prohibition and prevention of a trade and the regulation or governance of it. Indeed, the power to regulate and govern seems to imply the continued existence of that which is to be regulated and governed. The examination of other sections of the Act shews that when the legislature intended to give power to prevent or prohibit they did so by express words."

The plaintiff has, no doubt, suffered damage by reason of the acts of the corporation and their servants.

But, aside from the question of the plaintiff's right to bring an action at all under the circumstances for damages occasioned, in my opinion his action for damages could not be maintained so long as the by-law remained unquashed. See Pocock v. City of Toronto, 27 O. R. 635. All the authorities affecting the question of the construction of a section similar to sec. 404 were reviewed in Hill v. Middagh, 16 A. R. 356, where it was held by the unanimous decision of the Court that an action for damages under circumstances

similar to those arising in this case must fail. It was there said that the object of the legislature in passing the section referred to was, first, to protect officers and persons acting ministerially in carrying out the by-laws, and to confine the remedy of the person injured to the corporate body under the authority of whose illegal enactment the injury was committed; and, secondly, to provide that the illegal legislation and apparent authority should be removed out of the way of the suitor by an independent application; that, while it stood, an action of trespass could not be maintained against the corporation any more than, by force of an analogous provision, it could be maintained against a magistrate for acts done under a conviction made by him, though illegal on its face, without or in excess of jurisdiction, until the conviction had been quashed: Osler, J.A., at p. 388. See also remarks of Hagarty, C.J.O., at pp. 374 and 378, to the same effect.

I think, however, that the plaintiff is entitled to the other relief claimed by him, namely, a declaration that the provisions of the by-law already referred to were and are invalid, and also to an injunction. In Wilson v. County of Middlesex, 18 U. C. R. 348, it was held that goods seized under an illegal by-law might be replevied although the by-law was still in force, for the reason that the statute which prevented actions being brought for anything done under a by-law until it had been quashed, applied only to suits for the recovery of damages. Robinson, C.J., who delivered the judgment of the Court, stated: "We do not think that that provision extends further than to prevent actions being brought for the recovery of damages, in which it may be important to be able to tender amends."

In Rose v. Township of West Wawanosh, 19 O. R. 294, where an injunction was granted, Street, J., referring to Wilson v. County of Middlesex, commenting on sec. 338 (our 404), says: "Section 338 does not tie the hands of a person threatened with damage under an illegal by-law; it only prevents his bringing an action to recover damages for a wrong already done him until he has quashed it. There is nothing, therefore, in that section to prevent the plaintiff from maintaining this action, so far as it is based upon a claim to restrain further damage."

The validity of the by-law may be incidentally questioned otherwise than by motion to quash, namely, by a motion to

quash a conviction made thereunder: Regina v. Osler, 32 U. C. R. 324; Regina v. Belmont, 35 U. C. R. 298; or in an action of replevin: Wilson v. County of Middlesex, 18 U. C. R. 348; Haynes v. Copeland, 18 C. P. 150, 167; or by a mandamus. or in an action for an injunction to restrain the breach of the by-law, or to restrain the municipality from taking proceedings thereunder: Jones v. Town of Port Arthur, 16 O. R. 474; Rose v. Township of West Wawanosh, 19 O. R. 294; Smith v. Township of Ancaster, 27 O. R. 276; Petman v. City of Toronto, 24 A. R. 53; or a declaration that the by-law is invalid: Malott v. Township of Mersea, 9 O. R. 611; or incidentally upon the trial of an action: Roberts v. Climie, 46 U. C. R. 264.

In my judgment, by-law 64 of the city of Moose Jaw was invalid, before and after amended, and I declare it such.

The plaintiff will have an injunction restraining the defendants, their servants, officers, or agents, from interfering with the carrying on of his business of a hackman in the city of Moose Jaw.

As to costs, the plaintiff will have the general costs of the action, but no costs thereof occasioned through joining the claim for damages. The costs occasioned thereby shall go to the defendants. There shall be one taxation. The costs of the defendants will be deducted from the costs of the plaintiff. The balance found coming to the plaintiff on such taxation shall be paid by the defendants to the plaintiff, forthwith after taxation.

SASKATCHEWAN.

OUSELEY, DIST. CT.J. JANUARY 11TH, 1910.

DISTRICT COURT OF MOOSE JAW—CHAMBERS.

PLESTED v. McLEOD.

Pleading—Statement of Defence—"Not Guilty by Statute"—Leave to Plead with other Defences—Statutes of James I. not in Force in Saskatchewan—Action for False Arrest and Imprisonment.

Summons obtained by the defendant calling on the plaintiff to shew cause why the defendant should not be allowed to

plead "not guilty by statute" in addition to his special defences.

W. B. Willoughby, for the defendant.

G. E. Taylor, for the plaintiff.

OUSELEY, DIST. CT. J.:—On the return of the summons Mr. Willoughby, for the defendant, asked that the summons be amended by putting it conversely, that the defendant be given leave to plead special defences in addition to his plea of "not guilty by statute."

The action as now framed is an action for assault, false arrest, and imprisonment.

The defendant in the first paragraph of the defence pleads as follows: "The defendant pleads 'not guilty by statute' 7 Jac. I. ch. 5." Mr. Willoughby in his written argument says: "The defendant relies for his right to plead 'not guilty by statute' on the statute 7 Jac. I. ch. 5, and 21 Jac. I. ch. 12, which makes the first mentioned Act perpetual."

Mr. Taylor, for the plaintiff, argues that the statutes of James relied on by Mr. Willoughby are not and never were in force in the Territories nor in this province.

The statutes referred to remained in force in England from 1609 until 1893, when they were repealed by 56 & 57 Vict. ch. 8, known as "The Public Authorities Protection Act."

In dealing with the question as to whether the statutes of James are in force in this province, I may say that, although the question was raised in Mack Sing v. Smith, 9 W. L. R. 28, Mr. Justice Prendergast, while commenting on it, does not decide it, for, as he says (p. 34). assuming that the Rule and the statutes referred to are in full force, the defendants, on the facts above set forth, are not entitled to their protection." There is no decision of our Courts on the question, nor have I been referred to any decisions which bear directly on the point.

By sec. 11 of the North-West Territories Act it is provided that the laws of England relating to civil and criminal matters as the same existed on the 1st day of July, 1870, shall be in force in the Territories, in so far as the same have not been or are not thereafter repealed, altered, modified, varied, or affected by any Act of the Parliament of the United Kingdom applicable to the Territories, or of the

Parliament of Canada, or by any Ordinance of the Lieutenant-Governor in council, or of the Legislative Assembly.

Rule 113 of the Judicature Ordinance says: "Nothing in this Ordinance shall affect the right of any defendant to plead 'not guilty by statute,' but. if the defendant so plead, he shall not plead any other defence to the cause without the leave of the Judge."

Mr. Willoughby, however, at the hearing before me, argued that sec. 11 of the North-West Territories Act was designed to legislate for the future, and contemplated that at some future time there would be (as there are now) mayors, justices, and constables to whom the Act would apply, and that, the statutes of James not having been repealed until after the creation for the Territories of such mayors, constables, and justices, when such appointments were made ipso facto the statutes of James clothed them with power. I cannot adopt that argument; and hold that sec. 11 of the North-West Territories Act is referable only to such civil and criminal matters as were in 1870 "applicable to the Territories," subject to such conditions and restrictions as are set out in the section.

Mr. Taylor, for the plaintiff, cited The Queen v. Nan-E-Quis-A-Ka, 1 Terr. L. R. 211. The Chief Justice, in giving judgment in that case, dealing with the question of the applicability of the law of England as to marriage to the Territories, said; "In the first place, are the laws of England respecting the solemnisation of marriage applicable to these Territories? I have great doubt if those laws are applicable to the Territories in any respect. According to those laws, marriage can be solemnised only at certain times and at certain places or buildings. These times would be in many cases inconvenient here, and the buildings if they exist at all. are often so remote from the contracting parties that they could not be reached without the greatest inconvenience."

If, as the Chief Justice points out, he had grave doubts as to whether the laws of England as to marriage applied to the Territories, because there may have been no buildings in existence such as are referred to in the Act he was considering, and also on account of the inconvenience to which the contracting parties might be put, I hold that I should have, and I have, no doubts that, as there were no persons of the class mentioned in the statutes of James in existence, in 1870, in the Territories, to whom the statutes of James

can apply, the statutes of James never were and are not now in force in the Territories or in this province; consequently the defendant's right to plead "not guilty by statute" does not exist.

Mr. Taylor, however, took the further ground that the enactments under which the defendant claims the right to plead "not guilty by statute" relate to procedure and practice. The statutes of James were, as I have said, repealed in England by the Public Authorities Protection Act, in 1893, 56 & 57 Vict. ch. 61, so that in England in 1893 there was no right to plead "not guilty by statute."

In 1907, by sec. 15 of the Judicature Act, it was provided that "the jurisdiction of the Supreme Court shall be exercised, so far as regards the procedure and practice therein, in the manner provided by this Act, or in the manner provided by Rules of Court made from time to time under the authority of that Act, and, where no special provision is contained in this Act or said Rules, it shall be exercised, as nearly as may be, as exercised in the Supreme Court of Judicature in England as it existed on the 1st day of January, 1898."

There being no special provision applicable to the defendant in this case in any of our Acts or in our Rules, the English practice in 1898 governs, and as, under the English practice in 1898, the defendant's right to plead "not guilty by statute" was taken away by the Public Authorities Protection Act of 1893, there is no right in the defendant here to plead the statutes of James.

There is no doubt that pleading and the manner in which a defendant may plead is a matter of procedure and practice, and the preamble of the statutes and the statutes themselves shew this. The preamble in part says: "An Act for ease in pleading against troublesome and contentious suits presented against justices of the peace, mayors, constables," etc.

Although the preamble of the Act cannot control the context, I have perused the Act itself, and hold that it deals with matters of procedure and practice.

Both counsel in their written arguments lay great stress on the question as to whether or not the defendant was entitled to notice of action.

The question of the defendant's right to notice of action was raised incidentally, and was dealt with by both counsel

on the argument. I can only deal with it on the settlement of the pleadings, provided that I allow the defendant to plead the general issue. As the defendant has relied on the statutes of James for his right to plead the general issue, and as I hold that the statutes of James are not in force here, my right to adjudicate on the question as to the defendant's right to notice of action is taken away, as it is only when the defendant is allowed to plead the general issue that I can settle the pleadings.

Although the summons was amended at the hearing, the real question argued before me, and which I was asked to decide, was as to whether the statutes of James were in force in this province; so that the amendment was not needed. I could not, of course, have stopped the defendant pleaded the statutes of James if he wanted to, as, in my opinion, the Judge or Master, under Rule 113, has only the right to say what other defences shall be pleaded in addition to the plea of "not guilty by statute," but on this application I am asked by both counsel to decide whether the defendant has the right to plead the statutes of James, and, having arrived at the conclusion that they are not and never were in force here, I hold that he has not that right, and discharge the summons with costs to the plaintiff in the cause.

SASKATCHEWAN.

RIMMER, DIST. CT.J. JANUARY 18TH, 1910.

DISTRICT COURT.

DEJARDIN v. ROY.

Contract—Agreement to Pay Money in an Uncertain Event—Illegality—Wager.

Action to recover $50, in the circumstances mentioned in the judgment.

E. J. Brooksmith, for the plaintiff.

E. W. F. Harris, for the defendant.

RIMMER, DIST. CT.J.:—The facts are that the plaintiff and the defendant presented themselves at the Dominion land office on the same day to make entry for the same land as homestead, the land being the cancelled homestead of one P. Koch; the land was open for homestead entry on the following day. On the suggestion of some person present, the plaintiff and defendant agreed to draw lots for the privilege of making entry on the following day. They adjourned to an hotel for the purpose; two slips of paper were prepared, on one of which the word "land" was written, the other being left blank. The papers were held by a police constable. Just before the draw the plaintiff said to the defendant, "The one who draws the land must pay $50 to cover the expenses of the other." The defendant nodded affirmatively. The parties drew, and the defendant was successful in obtaining the paper marked "land." He made entry without further opposition from the plaintiff, but failed to pay the plaintiff $50, for which the plaintiff now sues. The defence is raised that the agreement was illegal, and that the plaintiff's claim is based on the result of a wager.

The question to be determined is, whether the agreement comes within the Lottery Acts or the statutes against wagers. I do not consider that it is within the intent and policy of the Lottery Acts. There was no sale of tickets or chances, which under the cases seems to be a necessary incident of a lottery: see judgment of Lord Alverstone, C.J., and the cases cited by Avory, K.C., in Willis v. Gerry and Stembridge, [1907] K. B. 448. But I hold that the contract was within the intent of 8 & 9 Vict. ch. 109, sec. 18, which renders wagering contracts null and void. A wager, as defined by Hawkins, J., in Carlill v. Carbolic Smoke Ball Co., [1892] 2 Q. B. 484, 61 L. J. Q. B. 700, is "one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that dependent upon the determination of that event one shall win from the other, and that the other shall pay or hand over to him a sum of money or other stake, neither of the contracting parties having any other interest in that contract than the sum or stake he will win or lose, there being no other real consideration for the making of such contract by either of the parties." I consider that the true position taken by each of the parties might be put in the words: "I believe I shall draw the paper marked 'land.' If I do, I will pay you $50."

If two persons at a horse race said of two horses running in the same race, the one, "I believe 'Tortoise' will win, and, if she does, I will pay you $50," and the other "I believe 'The Hare' will win, and, if she does, I will pay you $50," there will be little hesitation in holding that the transaction was contrary to the statute. I consider that the present case is analogous to the one supposed. However the contract is regarded, it comes to this, that the right of either party to $50 depended on the result of a contingent event, which the parties desired to be determined one way or another. The result seems to me to be no more favourable to the plaintiff because of the argument that the agreement to pay $50 depended on the result of the agreement to draw for right of entry. The winner of the draw won merely an inchoate right to present himself for entry in preference to the loser. He could not thereby acquire any title to the land, and the agreement was, in my judgment, open to the objection that it might be binding in honour, but was not enforceable, as it was itself a wagering contract.

I hold that the plaintiff is not entitled to recover. I dismiss the action with costs.

SASKATCHEWAN.

WETMORE, C.J. JANUARY 18TH, 1910.

TRIAL.

WATEROUS ENGINE WORKS CO. v. WELLS.

Sale of Goods—Contract—Order given to Agent of Vendors —Condition—Oral Agreement—Acceptance of Terms of Order—Notice—Time—Delivery of Goods—Evidence.

Action for the price of machinery sold by the plaintiffs to the defendant.

J. F. Frame, for the plaintiffs.

F. W. G. Haultain, K.C., for the defendant.

WETMORE, C.J.:—I find the following facts in this case. On the 29th June, 1908, one De Forge, the general agent

in this province of the plaintiffs, approached the defendant with the object of getting him to purchase an engine of the plaintiffs' make. The defendant had a second-hand engine of the American Abell Company's make, which he desired to give in part exchange for a new engine. De Forge informed him that he had no authority to accept second-hand engines, and that the proposition would have to be submitted to the company (by which I understand the head or principal office of the plaintiffs at Winnipeg); and, with the object of submitting the proposition to such office, an order. partly written and partly printed, being on one of the plaintiffs' forms, was filled in and signed by the defendant, whereby the defendant ordered from the plaintiffs one 26 horse power double cylinder Waterous engine and one 36 inch Rich band cutter and self-feeder, for the price of $2,425, payable as follows by the purchaser: promissory notes for $825, $800, and $800, payable respectively on the 1st days of December, 1908, 1909, and 1910, and by delivering to the plaintiffs one 20 horse power American Abell engine at Francis, free from all liens.

The machinery mentioned to be sold by the plaintiffs was, according to the order, to be delivered on cars f. o. b. at Winnipeg, addressed to Francis, Sask., on or about the 1st August, 1908. The defendant was desirous of getting information as soon as possible whether the plaintiffs would accept his second-hand engine, if not, he wanted to be in a position to make an arrangement with some other concern. If the plaintiffs would not accept this last mentioned engine, the agreement would be at an end. Therefore, after the order was signed, it was verbally arranged that the defendant was to be notified whether or not the plaintiffs would acept the order as it stood, and such notification was to be given, according to the defendant's testimony, within a week from the date of the order, and, according to De Forge, within 10 days or 2 weeks therefrom. In the view I take of the question, it is not necessary for me to determine which of these two gentlemen was correct in this respect. It is quite sufficient for me to find, as I do, that it was arranged and understood that notice was to be given to the defendant within a specified time whether or not the plaintiffs would accept the agreement as it stood.

The order contained the following clause: "This contract may be cancelled by the company at any time before actual

settlement for the goods is accepted by them or their agent, and the purchaser will have no claim for damages by reason thereof."

It was urged on behalf of the plaintiffs that the verbal arrangement as to the plaintiffs accepting the second-hand engine or not, and giving notice to the defendant thereof, was inconsistent with such clause and varied the same, and that that could not be done by verbal arrangement. I am of opinion that such contention is not correct. I have hereinbefore found that the order was made out and signed by the defendant with the object of submitting the proposition to the office at Winnipeg whether the plaintiffs would accept the second-hand engine in part payment or exchange for their machinery, and I further find that it was not to be considered a binding agreement unless the plaintiffs so accepted the second-hand engine, and notified the defendant of the fact.

In Pattle v. Hornibrook, [1897] 1 Ch. 25, Stirling, J., at p. 30, citing from Pym v. Campbell, 16 E. & B. 370, 373, states the following with approval: "The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement; and, if in fact he did sign the paper animo contrahendi, the terms contained in it are conclusive, and cannot be varied by parol evidence. . . . The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to shew that there is not an agreement at all is admissible." In the same case, Crompton, J., says: "I know of no rule of law to estop parties from shewing that a paper, purporting to be a signed agreement, was in fact signed by mistake, or that it was signed on the terms that it should not be an agreement until money was paid, or something else done. . . . The parties may not vary a written agreement; but they may shew that they never came to an agreement at all; and that the signed paper was never intended to be the record of the terms of the agreement; for they never had agreeing minds. Evidence to shew that does not vary an agreement, and is admissible." And the fact that the order was given to the plaintiffs' agent does not affect this conclusion.

In London Freehold and Leasehold Property Co. v. Baron Suffield, [1897] 2 Ch. 608, the deed in question was

delivered to one of the mortgagees, who was also solicitor of the grantor and of the other grantees. It was urged that the delivery to this gentleman was fatal to the contention that the deed was delivered as an escrow. While the Court held that the deed in that case was sealed and delivered as a perfect instrument to be used as an operative deed, it also held that it was not necessary to an escrow that it should be delivered to a perfect stranger. Lindley, M.R., who delivered the judgment of the Court, states the following, at p. 621: "They contended that to be an escrow the deed must be delivered to some person not a party taking under it; in short, to a stranger. In support of this contention reliance was placed on Co. Litt. 36a; Sheppard's Touchstone, 7th ed., pp. 58, 59; and Whyddon's Case, 1 Cro. Eliz. 520. No doubt, the language used in the authorities referred to, and reproduced in other works on real property and conveyancing, is in favour of this contention. But the language is very general, and we are not at all satisfied that the law is so rigid as to compel the Court to decide that where there are several grantees, and one of them is also solicitor of the grantor and of the other grantees, and the deed is delivered to him, evidence is not admissible to shew the character in which and the terms upon which the deed was so delivered. To exclude such evidence appears to us unreasonable; and we do not think we are compelled by authority to exclude it. We hold such evidence to be admissible, and in so doing we believe we are acting in accordance with modern authorities, beginning with Murray v. Earl of Stair, 2 D. & L. 82, and ending with Watkins v. Nash, L. R. 2 Eq. 262."

I am unable to distinguish between a delivery to an agent and a delivery to a solicitor of the party to the agreement, and in this case the agent was not a party, as was the solicitor in the case cited.

On the 14th July, more than two weeks after the date of the order, the plaintiffs wrote to the defendant as follows: "We beg to advise you that we will forward your engine within the next day or two, as we have one already on the car, and it is not worth while unloading same for the sake of a few days' shipment."

This letter was received by the defendant on the 16th July, and this was the first intimation that he had received that the plaintiffs had accepted the order. I hold, however,

that the latter did amount to notice that the plaintiffs accepted the order just as it was made out, including the acceptance of the second-hand engine in part exchange for the machinery ordered. I am of opinion, however, that the provision respecting the time within which notice of acceptance was to be given was not of the essence of the verbal arrangement, in this sense—if the notice had not been given within the prescribed time, the defendant could have considered the order at an end. But if, after receiving notice of acceptance, although it was given after the prescribed time, he so acted as to lead the plaintiffs to believe that he considered the order as effective, he could not afterwards turn round and contend that it was at an end. I am of opinion that the defendant did so act as to lead the plaintiffs to believe that he considered the order effective. He never notified the plaintiffs, on receiving the letter of the 14th July, that he would not accept the machinery, or that he considered the agreement at an end. When he received the letter of the 14th July, it was his duty, if he did not intend to receive the machinery by reason of the delay in giving the notice, to have promptly notified the plaintiffs of that fact. He did not do so. He never raised any objection whatever until about the 22nd or 23rd July, 6 or 7 days after he got the notice, and he knew all that time that the machinery was loaded on the car and was about to be forwarded. I find also that, at the time the order was signed, the defendant consented that the engine might be sent to a Fair proposed to be held at Regina, and I hold that that warranted the plaintiffs forwarding it to that place before sending it to Francis. On the 22nd or 23rd July (I think on the 23rd) the defendant was at Regina and saw the engine there, and also had an interview with De Forge, and for the first time intimated either to De Forge or to the plaintiffs, or to any person who was authorised to receive notice for the plaintiffs, that he had some hesitation about accepting the machinery, and stated as his reason that the plaintiffs had not notified him in time. His refusal to accept was not definite. He did not positively decline to do so. It was only after he returned to Francis that he sent a wire on the 23rd July positively refusing to accept, and even then he did not put his refusal on the ground of delay on the part of the plaintiffs in sending notice of the acceptance of the order, but he put it on the ground that the engine was not satisfactory.

At the time that the defendant received the letter of the 14th July his position was not altered. He had made no other arrangements. Subsequently he did make another arrangement. He made an arrangement with a representative of the American Abell Company to take one of their engines and to deliver his second-hand engine to them in part exchange, and the defendant gave some testimony in a vague sort of way that such arrangement was practically concluded before he received the letter of the 14th July from the plaintiffs, but I am satisfied, upon the perusal of the testimony of Sharpe, the agent of the American Abell Company, that such arrangements were not completed until about the 22nd or 23rd July, just about the time that the defendant began to discover that there were objections to his taking the machinery from the plaintiffs.

It was also set up that the engine did not answer the description of the one shewn in the catalogue exhibited to the defendant when he purchased, inasmuch as the one in the catalogue had the gearing on the right hand side, and the one forwarded had the gearing on the left hand side. I find that, at the time the order was signed, De Forge explained to the defendant that it was better to have the gearing on the left hand side; that it was an improvement; and that, upon such explanation, the defendant consented to accept an engine with the gearing on the left hand side.

The evidence does not satisfy me that it was understood or agreed that, if the order was accepted by the plaintiffs, they were to execute a counterpart of the order and deliver it to the defendant.

Reading between the lines, I am very much impressed with the idea that the defendant was able, after he received the letter of the 14th July, to make an arrangement with the American Abell Company by which he would get more allowed to him for his second-hand machine than was allowed by the order, and the temptation was too great for him, and he then, and only then, began to look around for some means by which he might get rid of his agreement with the plaintiffs.

The machinery was forwarded to Francis, and arrived there in due course from Regina. The defendant was notified of its arrival, and refused to accept it. Some slats for the carrier of the feeder were not shipped with the other machinery, but they were afterwards shipped.

The delivery of the goods f.o.b. at Winnipeg was a delivery to the defendant. The fact that they were addressed to the plaintiffs at Regina, in view of the defendant's consent before specified, and that they were addressed from Regina to the plaintiffs' agent at Francis, does not affect the question of delivery. The property was intended to be forwarded for the defendant. I think this is within the ratio decidendi of Leather Cloth Co. v. Hieronomus, 44 L. J. Q. B. 54.

The order contained an acceleration clause, making the whole amount of the purchase price payable on default of any payment.

There will be judgment for the plaintiffs for the amount of the money agreed to be paid for the price of the machinery, $2,425, freight paid on machinery $64, in all $2,489, and interest on $2,425 at 7 per cent. per annum from the 11th August, 1908, to the 4th December, 1908, and from the 4th December at 10 per cent.

As to the value of the second-hand engine. That engine has been sold, and it is out of the defendant's power to deliver it. I cannot, therefore, make the order prayed for, for the delivery of it to the plaintiffs. I can find no evidence placing any value on that engine. I will, therefore, refer it to the local registrar to inquire and find the value of such engine, and order that it be added to the amount of the judgment when ascertained. The plaintiffs will have no costs of the inquiry before the local registrar, as they ought to have proved the value of the engine at the trial.

I will add that I would not have made this reference if the plaintiffs had not prayed for the delivery of the engine to them, and that relief cannot be granted.

The plaintiffs will have the costs of the action to be added to the judgment.

SASKATCHEWAN.

RIMMER, DIST. CT. J. JANUARY 18TH, 1910.

CANNINGTON DISTRICT COURT.

MACDONALD v. BROWN.

Public Schools—Election of Trustees—Invalidity—Formation of School District—Invalidity of Acts of Trustees—Public Policy—Authority Conferred by Commissioner of Education—Letters of Deputy Commissioner—Illegal Distress for School Taxes—School Assessment Ordinance—School Ordinance—Damages.

Action for the return of a horse seized by the defendants and for damages.

J. T. Brown, K.C., for the plaintiff.

J. D. Murphy, for the defendants.

RIMMER, DIST. CT. J.:—This is an action to replevy the plaintiff's horse seized by the defendants by their bailiff Osten on the 17th December, 1908. The plaintiff alleges that the defendants were purporting to act as trustees for the South Antler school district; that the defendants were not the trustees, as they had not been duly elected; that they had not taken the oath of office required by law; that the value of the property seized greatly exceeded the taxes properly due and assessable; and that the plaintiff had given notice of appeal from the assessment and otherwise complied with the School Assessment Ordinance; but that the justice refused to hear the appeal; of all of which facts the defendants had notice.

The defendants set up that they were duly elected trustees of the said district No. 375; that the horse was seized in distress for taxes; that in causing the distress to be made they acted within their official capacity; and they plead secs. 44 and 47 of the School Assessment Ordinance; they deny that the distress was excessive; and say that they took the oaths of office; they plead sec. 36 of the School Ordinance; and that, no complaint having been made, the validity of the election cannot now be called in question; further, that,

the appeal having been adjudicated upon, the plaintiff is liable for taxes.

The plaintiff's claim is the return of the horse or $300 value and $300 damages; but at the trial his counsel admitted the return of the horse and asked for only nominal damages. Five similar actions against the same defendants were down for trial, and counsel agreed that the evidence taken in this case should be the evidence in each case.

As to the alleged appeal to a justice under sec. 11 of the School Assessment Ordinance, there was no evidence offered; and, upon the pleadings, I consider that it must be taken to have been admitted by the defendants that an appeal was taken in accordance with the requirements of the Act and dismissed by the justice on the ground of want of jurisdiction. These facts were pleaded by the plaintiff and not specifically denied by the defendants. Upon the material before me, I must assume that the appeal was rightly dismissed for want of jurisdiction to determine the questions raised.

I find the following facts. The South Antler school district 375 was established in 1895, as shewn by proclamation dated the 22nd April, 1895, comprising the area described in the proclamation (exhibit A.); and by first meeting of ratepayers held on the 14th March, 1895, the following were elected trustees and took oaths of office: J. H. McKillop, J. P. McCrindle, and William Staples. By resolution of the Council of Instruction of the 10th May, 1899, the area was reduced by striking off sections 13, 24, 25, 36. in township 4, range 1, and the district continued of the area described in exhibit B. There was no annual meeting of the district from the time of the first meeting until the proceedings in 1906 and 1907 hereafter referred to. Up to 1907, of the first trustees, J. P. McCrindle and J. H. McKillop continued to reside in the district. William Staples ceased to be a resident in 1904, when he moved to Oxbow. On the 26th February, 1906, a petition (exhibit C.) was presented by John Mills, Joseph C. Best, and Duncan Brown to the Commissioner of Education for formation of a new school district to be called the "Antler school district," comprising an area differing from the South Antler school district No. 375, but including some of the lands of that district. On the 30th May, 1906, the Deputy Commissioner of Education advised J. Mills of the existence of the South

Antler school district, and that, "as all that would be necessary would be to elect a board of trustees, the Commissioner is of the opinion that the old district should be retained and put in operation" (see exhibit 2). There is no reliable evidence that this was communicated to others of the committee. On the 6th July, 1906, the Commissioner, over his hand, issued the following (exhibit W.): "Under provision of sec. 7 of the School Ordinance, I hereby appoint Joseph C. Best, of Glen Ewen, Sask., to call a meeting of the ratepayers of the South Antler school district No. 375 of the North-West Territories for the purpose of electing 3 trustees for the said district." Joseph C. Best on the 18th December, 1906, issued the following notice: "There will be a public school meeting held at Duncan Brown's, section 16-4-34, Jan. 4th, 1907, for the purpose of electing 3 trustees for school district to be known as South Antler school district No. 375, the district to take the following territory" (here follows (exhibit E.) a sufficiently clear description of district No. 375 as it then existed.) "By order of the Commissioner of Education, Joseph C. Best. Meeting to commence at 1 o'clock p.m." Certain ratepayers of the district met at Duncan Brown's on the 4th January, 1907, but Joseph C. Best was not present. The meeting was never called to order, no business was done, and those present separated without any formal adjournment. The following notices afterwards issued: "The adjourned school meeting of the 4th January, South Antler school district No. 375, will be held at Joseph C. Best's, section 10, township 4, range 34, on the 6th February, 1907, at 1 o'clock. By order of Committee." The notices were not posted by Joseph C. Best, and he is not prepared to swear, and there is no evidence, that he gave them to any one else to post. Duncan Brown posted them; they were the only notices calling the meeting. Certain ratepayers of the district and other persons met at Joseph C. Best's on the 6th February, 1907. A chairman was appointed. The first business was a discussion of the area of the district, when a motion to approve the district as submitted by the department was unanimously rejected, and it was decided that the district proposed by ratepayers present should comprise a less area than the existing district. The meeting then proceeded to elect trustees for the area proposed by ratepayers, not for the South Antler school district No. 375. Duncan

Brown, John C. Best, and Joseph C. Best were declared elected. Not more than half the ratepayers were present at the meeting, and only 5 took part in the election of so-called trustees. J. P. McCrindle and J. H. McKillop were not present.

There can be no reasonable doubt on the evidence that Duncan Brown, John C. Best, and Joseph C. Best were elected for a proposed school district, and not for the South Antler school district 375. The procedure, so far as any followed, was that prescribed by secs. 14 to 32 of the School Ordinance for first meetings. The district as proposed at the meeting never was formed, though a reduction of area was on the 13th June, 1907, approved by the Commissioner; but the area remaining was not that proposed at the meeting. In June, 1907, a meeting was held to vote on a debenture by-law, at which only 5 ratepayers, of whom the plaintiff was not one, were present, and the debenture by-law was duly authorised by the Commissioner on the 7th October, 1907. Joseph C. Best left the district in 1907, and Robert Small, who was elected in his place, left the district in the fall of 1907. The plaintiff did not take part in the election of Small. In January, 1908, an annual meeting, so-called, was held at A. McKillop's, at which the plaintiff objected that the defendants were not trustees of South Antler school district 375, and that there was nothing before the meeting to shew who the retiring trustee was in any event. The ratepayers present refused to proceed to the election of a trustee, and all except the defendants withdrew from the meeting. A deferred meeting was held in March, 1908, and the same objection was raised, when the defendants, or one of them, in the presence of both, admitted that they were not trustees of the South Antler school district 375, but that they were elected in February, 1907, for a district then proposed to be formed. A good deal of confusion ensued; some persons were nominated, but refused to act; the ratepayers withdrew to George Beatty's, and there signed the protest (exhibit Q.). Some investigations have been made by a School Inspector, as a result of the protest, but, so far as the evidence shews, no decision has been reached on his reports. There is no doubt upon the evidence that the plaintiff and other ratepayers have protested and do protest that the defendants are not legal trustees. For the defendants some correspondence of the department was

put in to shew that they have been recognised by decision of the Commissioner of Education as legally elected trustees. These letters are signed by the Deputy Commissioner, and for the most part addressed to J. H. Macdonald. As an example, it is only necessary to refer to one (exhibit 6) dated the 19th May, 1908, in which the following words occur: "In connection with these matters, I beg to advise that, as already explained, neither your district as constituted nor your present school board is open to question on the ground of illegality. The school district was legally erected several years ago, and your board of trustees are legally constituted, otherwise they would have been set aside on complaint. See sec. 34 of the School Ordinance."

Under warrants of the defendants the plaintiff's horse was seized for taxes on the 17th December, 1908, and kept for 2 weeks out of his possession.

I hold that up to the time of the meeting in January, 1907, J. P. McCrindle and J. H. McKillop were the continuing trustees of South Antler school district No. 375; that the school district formed in 1895 continued by virtue of the Ordinance of 1901, ch. 29, sec. 178 (see Curren v. McEachren, 5 Terr. L. R., judgment of McGuire, C.J., at p. 338); and that the persons named continued trustees by virtue of the Ordinance of 1901, ch. 28, sec. 84, C. O. 1898 ch. 75, sec. 27, and 1896, ch. 2, sec. 7. They were trustees, and it had been their duty from time to time to call annual meetings under sec. 53 of the School Ordinance, and to cause special meetings of ratepayers to be called to fill any vacancies that might have occurred (see sec. 103). If any vacancy was not filled within a month, the Commissioner, under sec. 103, might appoint some qualified person to fill the vacancy. If the trustees failed to call any annual meeting, a deferred meeting could be called under sec. 78. In addition to the first school meeting provided for in secs. 14 to 32, there are 3 kinds of meetings of ratepayers contemplated by the Ordinance: the annual meeting (secs. 53 to 69); deferred annual or other meeting (sec. 78); and a special meeting (sec. 79). A special meeting may be held at any time for any necessary purpose not otherwise provided for. It is clearly a meeting other than an annual or deferred annual meeting. It must be called by the secretary (if any), though one of the powers by which he can be authorised to make the call is the Commissioner. Under sec. 7 it is the

duty of the Commissioner and he shall have power (sub-sec. 7) "to appoint some person to call any school meeting required to he held under this Ordinance, when there is no person authorised to call such meeting or when the person so authorised neglects or refuses to act." This would apply if no secretary. Though, under the conditions shewn by the evidence to be then existing in the district, the meeting required to be held would appear to me to be a deferred annual meeting, I hold that it was in the discretion of the Commissioner to fill the vacancy caused by the removal of William Staples from the district by exercising the power of appointment vested in him under sec. 103, or by causing a special meeting to be called to fill the vacancy by election.

Assuming, as I consider that I must do until the contrary is proved, that the Commissioner acted within the scope of his powers, the authority to Joseph C. Best may be treated as one to call a special meeting. It expresses one definite purpose for the meeting, and is not expressed as an authority to call a deferred annual meeting. It may be, as contended for the plaintiff, that the Commissioner exceeded his powers in authorising a special meeting to elect 3 trustees, when there was only one vacancy—I having found that McKillop and McCrindle were continuing trustees, by virtue of sec. 84, that there was no "vacancy" as to them within sec. 103; but their successors must be elected at an annual or deferred annual meeting; and that until this was done they would continue. I do not find it necessary to decide this point, because, when we come to consider the action of Joseph C. Best under the appointment, I find that the notice posted on the 18th December, 1906, signed by Joseph C. Best, does not comply with sec. 80, sub-sec. 2, which requires that "the notices calling a special meeting shall set forth the purpose of the meeting." If the meeting was intended to be one to fill a vacancy in the office of trustee caused by William Staples ceasing to be an actual resident within the district, it should have so stated, and it does not. The notice contains latent ambiguity. It is not one calling a deferred annual meeting, but, when one considers what it is, it may on the face of it be intended as calling a special meeting or as calling a first meeting for the formation of a new district. The parol evidence given in explanation convinces me and I find that Joseph C. Best had his mind upon the formation of a new district because he joined in a peti-

tion for a new district. There is no evidence that the letter of the Department to J. Mills of the 30th May, 1906, was communicated to Best; he had not received the Department's letter to him of the 9th February, 1907, at the date of the second meeting at his house on the 6th February, 1907; and the whole conduct of that meeting, of which he was chairman and secretary, and the returns made to the Department shew the intention to form a new district and one of different area to the South Antler school district No. 375. These points are material only as shewing that if the second meeting of the 6th February, 1907, were an adjournment of that of the 4th January, 1907, it was not called in the manner contemplated by the statute. The notice posted on the 18th December, 1906, for the meeting of the 4th January, 1907, was abortive. No meeting was held that day. As to the meeting of the 6th February, 1907, Joseph C. Best, the only person authorised, did not sign or post the notice; the only meeting he was authorised to call was a special one; and the notices did not specify the purpose. There were not more than half the ratepayers present, and the conduct of it was in manner prescribed for a first meeting on the formation of a new district. I hold that these were irregularities which might have materially affected the result of the election, and that the persons declared elected were not duly elected trustees of South Antler school district No. 375. See Regina v. Thwaites, 1 E. & B. 708; Re Local Improvement District No. 11 A., 2 Sask. L. R., judgment of Johnstone, J., at p. 81; Encyc. of Laws of England, vol. 5, p. 116. Even had the meeting been duly convened as a first meeting to form a new district, the persons declared elected were duly elected, because the conditions under which, by sec. 23 of the School Ordinance, 1901, an election could be held, had not been first fulfilled, the ratepayers having voted unanimously against the district described in the notice calling the meeting.

Except as to approval of debenture, there is no evidence of any decision of the Commissioner that the defendants are trustees. The letters of the Deputy Commissioner above referred to do not constitute an adjudication upon any matter in dispute. I can not consider them more than advisory, in view of sec. 2, sub-sec. 2, of the Ordinance of 1901, which provides that in this Ordinance, unless the context otherwise requires, (2) the expression "Commissioner" means

the "Commissioner of Education," and the recent decision of the Court en banc in Rex v. Duff, ante 290. (See judgments of Wetmore, C.J., and Newlands, J.). I cannot imply a power to the Deputy Commissioner to exercise judicial functions. No complaint was made to the Commissioner on investigation held by him under sec. 34 within 20 days after the so-called election of the defendants. It is contended that, the plaintiff not having pursued this remedy, he has lost all right to raise the question of legality of election. I hold that the section, being a power-conferring one, must be construed strictly, and that there cannot be read into it an intention of the legislature to deprive ratepayers of rights they possessed otherwise. The section is not one curtailing rights; it is one creating an expeditious procedure in substitution for one existing under C. O. 1898 ch. 75, sec. 25. I find as a fact that it was not until after the 20 days fixed by the section had expired that the plaintiff discovered that the defendants assumed to act as trustees of the South Antler school district No. 375.

It is further contended that the authority of the Commissioner to borrow money on debenture was a binding decision of the Commissioner upon the question of election of trustees. I do not find anything in secs. 128 and 130 from which there can be implied a construction that the decision of the Commissioner under these sections is conclusive except as to the validity of the by-law. The procedure prescribed by secs. 107 and 130, referring to the issue of debentures, does not invalidate an adjudication as the validity of election of trustees, though, under sec. 122, an investigation with regard to the manner in which the poll upon the by-law was conducted may be held. There has been no judicial inquiry by the Commissioner. I cannot regard the omission of the plaintiff to demand a poll on the by-law as an acquiescence in it working estoppel on the question of the validity of his assessment and taxation, and a poll would not have decided the question in issue, save that the demand for it might in itself have estopped the plaintiff. In face of the strong protest to the Deputy Commissioner, his standing by when he had notice of the poll cannot be said to be such as to have led the Department to believe that he acquiesced. Had he demanded and taken part in a poll, there would, I conceive, be conduct leading to the belief that he acquiesced. I find nothing in the School Ordinance or

the School Assessment Ordinance which deprives the plaintiff of his common law right to establish that the seizure made was by a person who had no authority. The persons who authorised the seizure are not and never have been trustees of the South Antler school district No. 375. If they are trustees for any district, their jurisdiction is limited to that district: it is open to the plaintiff to object to their assumption of power to distrain upon property without the area for which they are trustees. The evidence shews that J. H. MacDonald resides without the area which the ratepayers proposed at the meeting of the 6th February, 1907.

It was urged for the defendants that public policy demands that judgment should be given for them. I do not consider that the validity of the debenture by-law is affected by this judgment. The policy to be deduced from the Ordinance is that the ratepayers shall, as far as practical, control the administration of the affairs of the district. I do not consider that the intention of the Ordinance is that, as the evidence shews to have been done in this case, persons should usurp the office of trustee against the wish of the majority of the ratepayers, and be held not liable for the legal consequences of such conduct.

There is judgment for the plaintiff, $1 damages, and costs. Either party to have to apply for directions after taxation.

SASKATCHEWAN.

WETMORE, C. J. JANUARY 20TH, 1910.

TRIAL.

MOSELEY v. KETCHUM.

Fire—Accidental Starting on Defendant's Land—Escape to Plaintiff's Land Adjoining—Negligence — Prairie Fires Ordinance, sec. 2, sub-sec. 1; secs. 4, 9—"Letting"—"Permitting"—Liability—Damages.

Action for damages for injuries to the plaintiff's property by fire spreading from the defendant's property.

R. W. Shannon, for the plaintiff.

McIntyre, for the defendant.

WETMORE, C.J.:—The facts of this case as I find them are as follows. On the 3rd May last a fire started on a quarter section of land owned and occupied by the defendant, and spread to the adjoining land, and so to the land of the plaintiff, and burned all the grass off of his pre-emption and nearly all off his homestead. Next day the plaintiff interviewed the defendant on his quarter section, and asked him to shew him where the fire started. The defendant pointed this out, and at the same time stated that he did not know how it started, but that he was smoking a cigar, and perhaps that caused the fire, and, upon the plaintiff stating "that it was a bad day to let any fire get around there," he replied that he could not help it. He did not do it intentionally. The plaintiff told him that the fire had done him considerable damage, and he thought he was entitled to some little compensation. Two days afterwards the defendant went to the plaintiff's place and said to him that he did not like the idea of his going to the North-West Mounted Police about it; that the fire was a pure accident; and that he would watch that it did not occur again. The plaintiff told him that he was depending on the hay to pay off debts, and the defendant asked him to let the thing drop, as he had not got any compensation to give him. This was all sworn to by the plaintiff, and was not in terms contradicted on the part of the defendant. He himself, however, did testify that at the time the fire broke out he was mending a plough a long distance away from where the fire started, and that he had been employed at that work for from an hour to an hour and a half before it broke out. He also swore that he did not tell the plaintiff that he started the fire. It will be observed that the plaintiff never swore that he did tell him that. As a matter of fact, the defendant seemed to evade touching upon what the plaintiff did specifically testify to.

I find, moreover, that a charge was laid against the defendant for an offence under the Prairie Fires Ordinance, and that he appeared before the justice and was convicted and fined. He never offered any testimony on that occasion, either of himself or any other person. The reason he assigned for not giving testimony was that he did not know that it was a trial until it was over, and he was fined $15 and costs. However, he corrected that by stating that just before he was fined he asked the justice if it was a trial, and was informed that it was; but he said that up to that time

he thought it was a police court investigation or a police court sergeant's examination. This testimony, in my opinion, seems greatly to increase the weight of the circumstantial testimony pointing to the conclusion that the defendant started the fire. As a matter of fact, the justice asked him if he desired to give evidence, and he refused. Under the circumstances, I find that the defendant caused the fire in question by dropping a lighted cigar on the inflamable substances where he so dropped it. This was not done deliberately with the intention of starting a fire. It was done carelessly and thoughtlessly. There was a very high wind blowing that day, and the defendant, after perceiving the fire, made every exertion to prevent it escaping, but, owing to the wind, without effect. It was urged that, under the circumstances, there was no negligence on the part of the defendant, either in "letting the fire run at large on any land not his own" or "permitting the fire to pass from his own land" or "allowing it to run at large," and that only some one of these acts or omissions to act constitutes an offence under sub-sec. 1 of sec. 2 of the Prairie Fires Ordinance, C. O. ch. 87, and renders a person liable to a civil action under that sub-section.

Mr. Justice Beck, in a very able and well considered judgment, in Clark v. Ward, 9 W. L. R. 657, has reached the conclusion that, in order to successfully maintain an action for letting or allowing a fire to run at large or for permitting it to pass from the owner's land, as provided by the sub-section of the Ordinance to which I have referred, it must be established that there was negligence at the common law, as modified by the Imperial statute 14 Geo. III. ch. 78, sec. 84. It is not, I conceive, necessary for the purposes of this case to state whether or not I agree with that conclusion. It will be sufficient for me to state that I have great hesitation in agreeing with it.

Dean v. McCarty, 2 U. C. R. 448, was the first case in point of time decided in Upper Canada, referred to by Beck, J., in his judgment, and subsequent cases have approved of that decision. I cannot help but feel that the character of the country was on important element in deciding Dean v. McCarty. The fact that Upper Canada was largely a forest country, and that, in order to bring the land under cultivation, it was necessary to cut down the forest and burn the wood, rendered it desirable that a too stringent rule should not be laid down in regard to fires escaping and do-

ing damage; it would not be in accord with the conditions of the country to do so. The Chief Justice in his judgment lays stress upon that aspect of the question; and Richards, C.J.. in Gillson v. North Grey R. W. Co., 35 U. C. R. at p. 486, bases his judgment largely upon the same aspect. I would also draw attention to the fact that the cases cited by Beck, J., were all decided on common law principles, as affected by the Imperial statute I have referred to. I mean by that that they were not decided upon the construction to be placed upon a statute, as this case must be decided.

The condition of things in this country is entirely different from what it was in Upper Canada. This is not essentially a forest country, and it is only in a. comparatively speaking, small portion of the country that the forest has to be cut down for the purpose of cultivating the land. In dealing with such a case, it is necessary to put a construction upon the Ordinance in question, and in doing that to consider the object the legislature had in view in passing that Ordinance. What were the evils which is was intended to remedy? When I consider the disastrous character of prairie fires, the fact that a family's means of living for the year are frequently swept away by them, that the extent of them frequently leaves the country for miles bare of grass for the cattle, and that dwelling-houses and out-houses are frequently swept away, I am very much inclined to the opinion that this legislation was passed with the intention to compel people to take at least extra care that fires should not be allowed to get away, a care the want of which would not necessarily amount to negligence.

Let us examine the Ordinance. Section 4 provides that no person shall kindle a fire for the purpose of guarding property, burning stubble, or clearing land (all important purposes in agricultural pursuits and for protecting property), unless certain steps are taken which seem to insure the utter impossibility of the fire escaping. In view of that, it would seem extraordinary that the intention of the legislature was to limit the offences mentioned in sub-sec. 1 of sec. 2, and consequently the right of action for damages occasioned thereby, to what might be considered the reasonable care or diligence of the ordinary individual. Again, the Ordinance provides that a person guilty of an offence thereunder "shall be liable to civil action for damages." Would that action only arise in case of negligence? If so, where is the necessity for such a provision, because sec. 9

of the Ordinance is sufficient to cover all common law rights of action?

In Macartney v. Miller, 2 W. L. R. 87, which was a case decided by myself, I stated at p. 89 as follows: "It was urged on behalf of the defendant that no offence had been committed against this section because there was no letting or permitting upon the part of the defendant; that the term 'letting' or 'permitting' involved the idea of action or abstaining from action. Conceding this to be true, I am of the opinion that there was on the part of the defendant at least an abstaining from action." I am cited, therefore, as laying down that the term "letting" or "permitting" involves the idea of action or abstaining from action. I am inclined to think that I only intended to concede that for the purposes of that case. But, if I intended to go farther, it was not necessary to do so in the decision of the question then before me. I will not say anything further on that subject than to refer to a definition given for the word "permit" in Murray's Dictionary, namely, "not to prevent." It occurs to me that that meaning might be given to the word in sub-sec. 1 of sec. 2 of the Ordinance, so as to bring it within the intention of the legislature. However, I give no decided opinion on the subject. I merely express my doubts, because in this case I find that the dropping of a lighted cigar on inflammable material, such as the prairie grasses would be in May, with a strong wind blowing, was gross negligence, and, starting the fire in such a way, the defendant permitted it to pass from his own land and run at large. It will not do for a person who has negligently started such a fire, in such circumstances, to say, "True, I was negligent in starting it, but I did not permit or allow it to go at large, because I did all I could to prevent it doing so."

Having thus found, I hold that the defendant is, under the provisions of the sub-section of the Ordinance referred to, liable to the plaintiff for any damages to property he may have sustained by reason of such fire.

The evidence established that a large quantity of hay so-called was destroyed on the plaintiff's land. This hay consisted of a growing crop of what is known as prairie wool. The testimony of the plaintiff is that from 250 to 280 acres of this was destroyed. He saved about 30 acres of it. I am free to confess that it seems incredible to me that 320 acres of land should contain from 280 to 310 acres of this wild

hay. However, this evidence was not contradicted. It was attempted to be shewn on the part of the defendant that this hay was, as it stood, worthless at that time of the year, but, assuming that to be true, it would be worth something later in the season, and therefore worth something as it stood on the 3rd May. Evidence on the part of the plaintiff was presented to shew that as it stood on the 3rd May it was worth $3 an acre. I do not see my way clear to disregard the uncontradicted testimony of the plaintiff as to the quantity of this hay destroyed. I will put it, therefore, at 250 acres, and I will allow as damages $400. I am of the opinion that that amount will cover the amount of damages to the plaintiff's property.

Judgment for the plaintiff for $400 and costs.

SASKATCHEWAN.

LAMONT, J. JANUARY 20TH, 1910.

TRIAL.

WRAY v. CANADIAN NORTHERN R. W. CO.

Railway—Injury to Passenger Alighting from Car at Night —Train Brought to a Standstill, but Car not Opposite Platform—Implied Invitation to Alight—Ignorance of Danger—Absence of Warning — Negligence—Contributory Negligence—Damages.

Action to recover damages for injuries sustained by the plaintiff in alighting from the defendants' train at Lloydminster.

H. C. Lisle, for the plaintiff.

A. M. McIntyre, for the defendant.

LAMONT, J.:—On the 15th September, 1908, the plaintiff purchased in Toronto a second-class ticket from Toronto to Lloydminster, and took the train for Lloydminster. On arriving at North Battleford, one of the defendants' employees notified the passengers in the car in which the plaintiff was riding, which was a second-class car, to go into the next car forward, which was also a second-class car. On going to that car, it was found to be full, and the plaintiff and others were unable to obtain accommodation therein. The defendants' conductor then told the plaintiff and others to go into the car at the rear of the one they had been in. They did so. It was a first-class car. The plaintiff remained in this car until the train reached Lloydminster at midnight.

Just before reaching Lloydminster, one of the defendants' servants called out "Lloydminster." As soon as the train came to a standstill, the plaintiff took her portmanteau and went toward the forward end of the car in which she was riding. The door of the car was wide open. She went through the door and down the steps of the car and stepped off the last step, expecting to step on the station platform. There was no platform there, and she dropped about 4 feet to the ground, and was injured. The train had come to a standstill for the purpose of allowing passengers to alight before any of the first-class cars had reached the station platform. The defendants' brakesman testified that the forward end of the second-class car was opposite the platform, and that by going through the second-class car the plaintiff could have got out on the station platform. The only lights in the vicinity of the place where the plaintiff was injured were the lights in the cars themselves, and the street lamp across the street from the railway platform and about 30 feet back from the railway track. The plaintiff had never been at Lloydminster before. Under these circumstances, is she entitled to recover?

A railway company, although bound to use proper care and skill in the carriage of their passengers, are only liable for injuries received by a passenger in alighting from their train when the company or their servants have been guilty of negligence: Indian R. W. Co. v. Muckerjee [1901] A. C. 69. For the plaintiff it was contended that the company were guilty of negligence in not providing proper facilities for the safe detrainment of their passengers. For the defendants it was contended that the plaintiff was guilty of contributory negligence (1) in stepping off the car without seeing that there was no platform there, and (2) in stepping off at all where she did, when by going through the second-class car she could have reached the station platform. Two questions, therefore, require determination: (1) were the company guilty of negligence in not providing proper facilities for the safe alighting of their passengers from their train at the point where the train was stopped for the purpose of allowing passengers to alight; and (2) could the plaintiff, by the exercise of reasonable care, have avoided the accident?

By sec. 258 of the Railway Act, a duty is cast upon the company to maintain and provide good and sufficient accommodation and facilities for traffic at every station, and by sec. 2, sub-sec. 31, "traffic" includes traffic of passengers

as well as goods; and in Robson v. North Eastern R. W. Co., 2 Q. B. D., Mellish, L.J., says: "It is clearly the law that railway companies are bound to find reasonable means for passengers to alight at every station at which they choose to stop." The plaintiff, although the holder of a second-class ticket, was directed by the defendants' conductor to take a seat in a first-class car, and was therefore properly riding therein. Before reaching Lloydminster the defendants' servant had called out "Lloydminster." This, together with the fact that the car had come to a standstill and the passengers were getting off, and that the forward door of the plaintiff's car was wide open, constitutes, in my opinion, an invitation to the plaintiff to alight there, and an intimation that she might alight there with safety. Having received an invitation to alight, she did so, without having received any warning from the defendants' servants that there was no platform there or that more than ordinary care was required in alighting. In Cockle v. London and South Eastern R. W. Co., L. R. 7 C. P. 321, the facts were similar to those in this case. There, while the body of the train drew up alongside of the platform, the last carriage, in which the plaintiff rode, was opposite the receding part of the platform, but about 4 feet from it. The night was dark, and the place where the last carriage stopped was not lighted, although the rest of the station was well lighted with gas. There was no express invitation given by the servants of the company to alight, but the train had been brought to a final standstill, and did not move on again until it started upon its forward journey. No warning was given to the plaintiff that the carriage was not close to the platform or that care was necessary in alighting. The Court held that bringing a railway carriage to a standstill at a place at which it is unsafe for a passenger to alight, under circumstances which warrant the passenger in believing that it is intended he shall alight, and that he may do so in safety, without any warning of his danger, amounts to negligence on the part of the company for which, in the absence of contributory negligence on the part of the passenger, an action may be maintained. I therefore hold that there was negligence on the part of the company.

Was there contributory negligence on the part of the plaintiff? I have come to the conclusion that there was not. It was urged that she was guilty of contributory negligence in stepping off without first ascertaining whether or not

there was a platform on which to alight. The night was dark, and the place was not lighted except by a street light fully 30 feet back from the railway track, which light was not sufficient to shew her that there was no platform there as when she stepped off the car she believed that she was stepping onto the platform. In Weller v. London Brighton and South Coast R. W. Co., L. R. 9 C. P. 126, Brett, J., said: "If the name of the station had been called out, and the train had come to a standstill, no warning being given to the contrary, the jury may very properly say that a passenger is guilty of no want of reasonable care in getting out. He has a right to suppose that the train has reached the spot where it is intended that he shall get out. It was said that the plaintiff acted imprudently in stepping out in the dark, without first ascertaining that the platform was before him. But it seems to me that the jury might well say that, the name of the station having been announced and the train having stopped, the passenger might very reasonably assume that if the carriage had gone beyond the limits of the station he would have been told so."

The case of Owen v. Great Western R. W. Co., 36 L. T. N. S. 850, cited on behalf of the defendants, is clearly distinguishable. There the passenger alighted in broad daylight, and he knew the place well. But, even in that case, Lush, J., in holding that the company had not been guilty of negligence, used the following language: "Had the train arrived at night time, and there had not been sufficient light at that spot, or any warning given to passengers in that carriage, that it was below the platform, and if a passenger had stepped out in the belief that he was stepping onto the platform and had so met with injury, no doubt the case would have been different. But the time was the middle of the day, and the plaintiff knew the place well, and the precise part of the station where he had to alight."

The case of Quebec Central R. W. Co. v. Lortie, 22 S. C. R. 336, was also cited on behalf of the defendants as supporting the argument that the plaintiff was guilty of contributory negligence in not going through the second-class car, by which she could have reached the platform. In that case the train was longer than the platform, and the car in which Lortie was travelling was not beside the platform when the train was brought to a standstill. It was daylight, and he knew there was no platform there, but, fearing that

his car would not be brought up to the platform, and that the train was about to move on, he jumped to the ground with his portmanteau in his hand, and, alighting on a round stone, was hurt. By going from the rear end of the car from which he alighted to the front end he could have got off on the platform. It was held that the company were not guilty of negligence. This case, however, can have no application where, as in the present case, the plaintiff was not aware that there was no platform opposite her car. In that case Lortie knew the danger, but preferred to take the risk rather than go through the car or call for assistance. In the present case the plaintiff was not aware of her danger. and believed she was stepping on to the platform. In my opinion, the announcing of the name of the station by the defendants' servant, the bringing of the train to a standstill, the fact that the other passengers were getting off the cars, justified the plaintiff in coming to the conclusion that it was intended that she should alight there and that she might alight with safety. In doing so I do not find that she was guilty of contributory negligence.

There will be judgment for the plaintiff. I assess the damages as follows:—

Doctor's bill	$ 48 00
Drugs	2 40
Board	90 00
General damages	400 00
In all	$540 40

The defendants will pay the plaintiff's costs.

YUKON TERRITORY.

CRAIG, J. DECEMBER 15TH, 1909.

ARBITRATION.

RE BINETTE.

Crown—Government of Yukon Territory—Liability for Acts or Omissions of Officers or Servants—Respondeat Superior—Government Highway—Subsidence—Mining Operations — Injury to Private Property — Arbitration and Award.

An arbitration between the Commissioner of the Yukon Territory and Annie Binette.

E. C. Senkler, for the Crown.

John Black, for Annie Binette.

CRAIG, J.:—By a submission signed by the parties, a certain matter was referred to me to determine the damages as well as the legal liability.

The submission differs from an ordinary submission in this respect, that it is more in the nature of a petition of right, although not in that form, where both the facts and the law are to be determined by a sole arbitrator. The recital of the submission is as follows: "Whereas the said Annie Binette is the owner of a certain building in Grand Forks, Yukon Territory, known as the Queen's hotel, situated on creek claim No. 6 above discovery on Bonanza creek; and whereas during the spring and summer of 1905 the ground upon which the said Queen's hotel stood subsided, owing to the owners of the said claim No. 6 above discovery, or their workmen or agents, carrying on mining operations and excavations under the government road and under the said Queen's hotel during the previous winter." The submission then goes on to recite that, owing to the subsidence of the buildings, expense was incurred and damages sustained, and there being a difference as to the liability and damages, the matter was referred to my sole arbitrament.

The submission further goes on: "That it is agreed that the following questions be submitted: (1) whether any liability attached to the government of the Yukon Territory for the subsiding of the said Queen's hotel and for the expenses incurred in the raising and repairing of the same; (2) if the first question is decided in the affirmative, what is the extent of the liability?"

The history of the matter is as folows. Some time during the winter of 1905 the owners of creek placer claim No. 6 above discovery on Bonanza proceeded to work their claim across the government road, following apparently the pay-streak in that direction. The claimant in this case became the purchaser of what is known as the Queen's hotel some time in April of 1905, and, so far as I can gather from the evidence, which is most indefinite, the excavation and drifting had taken place in the previous winter. The road known as "First avenue" in Bonanza is part of a main highway running from Dawson up the creeks, and is one of the principal roads in the Territory. It was built in 1901, and since that time has been more or less kept in repair and maintained by the government of this Territory. The claimant's property, the Queen's hotel, adjoins the road, as is shewn by the plan filed as one of the exhibits—exhibit C—admitted by

both parties to be authentic. In January, 1905, complaints were made, not by this person nor by any person on her behalf, that this drifting and excavating was going on and would endanger the road. In January of that year Mr. Bertrand, superintendent of works and buildings, was sent out to inspect, on behalf of the government, the work in its relation to the road, and he reported on the 25th of that month that he had "made an inspection of the mining operations at present conducted within the town-site of Bonanza," and that the operations had not damaged the road, and that he did not anticipate any difficulty as resulting from such mining. From the evidence of Mr. Bertrand it would appear that this inspection was a most cursory one, and he made only one inspection. He could not tell exactly the actual distance the excavation had extended, nor could he give, with any degree of certainty, but only approximately. the direction. This was the only visit he made into the drift. The shaft which he saw and the drift which he inspected would not have affected the Queen's hotel as he described it, as the shaft was sunk opposite the Gold Hill hotel, a distance of some 80 or 90 feet from the Queen's hotel. Some time after that—the 10th March—A. J. Baudette, government mining engineer, was instructed to proceed to the place in question, and he made an inspection and found a shaft at a distance of about 180 to 200 feet further down stream and opposite the Bonanza hotel. He found that this excavation had not proceeded far across the road, and he ordered it to be closed up and filled up with the tailings, and placed a man—Henderson—in charge to see that this was done. He afterwards inspected this shaft, and found that it was closed. He does not think that the damage could have resulted from that entrance. However that may be, in June of that year the road in front of these various properties, and extending pretty well between these two shafts, subsided 2 or 3 times as much as 8 feet, and the Queen's hotel, as well as other buildings along the road, fell in, and great expense and damage were caused by this.

The submission recites that the hotel subsided owing to the owners of the claim carrying on mining operations and excavating under the government road and under the Queen's hotel. It is argued by counsel for the claimant that this is an admission that excavation under the road caused the damage. I do not think so. It was a mere recital in the submission of the operation carried on, and it recites two

facts—both the mining under the road and under the hotel. Now, whether the mining was carried on under the hotel or not, is not shewn by the evidence. The only witness called by the claimant is a man who saw nothing more than the mouth of the entrance, and knew only from hearsay as to the mining under the road. It may very well be that the mining under the road would not have affected the hotel at all; if the operations were carried on in frozen ground, and nothing occurred to thaw the ground immediately under the hotel, there was no reason for its falling in. The recital is as much against the claimant as in her favour, because it recites the fact that there was excavation under the hotel. The contention of the claimant is that the government, having built the road and having assumed the repairing and maintenance of it, are liable because they allowed trespassers to cros the road and damage it, and cause, owing to the subsidence of the road, the subsidence of the buildings and the ground under the buildings, and consequent damage and loss of trade. It will be observed that the damages are not claimed because of the use of the road as a highway. The damages are the result and are claimed because of a trespass by people not directed by or under the control of the government.

It is further argued that, owing to the negligence of the government's servants in not stopping the work and not seeing that the injury was at once repaired and the ground filled in, the government are liable. As the case was presented to me, the argument in defence was mainly on the ground that the work of excavating by the trespassers was not the immediate and proximate cause of the injury, and that there was no negligence on the part of the Crown, and apparently assuming that if this were shewn to be the case there would be liability.

I am of opinion that the claimant cannot succeed, but the reason for this opinion is an entirely different one from that urged by counsel for the government. I think the only doctrine which could be applied to fix liability upon the government is the doctrine of respondeat superior. If I were to treat this as a municipal question in an ordinary municipality which by statute is called upon to build and maintain highways, and where by statute the municipality is rendered liable for damages caused by non-repair or by the neglect of its paid servants in charge of public works, then I might take a very different view of this case, perhaps,

and then consider the question of proximate cause of injury. Even taking that view of the case, I cannot find as a fact that the work of excavation under the road was the proximate and immediate cause of the injury to the building. I cannot tell from the evidence, and there is no evidence to support a finding, that the excavation under the road caused the subsidence of the building. It might have been excavation under the building itself, for which, by no stretch of argument, could the government be held liable. It is a primary proposition, I think, that a person cannot be held liable for the acts of third persons with whom he has no connection and over whom he has no control, as in this case. It is true that the government could have prevented the excavation under its own road, but, so long as the government road was not injured, it was a matter of option with the government whether they interfered with the mining or not. If the mining could have been carried on without injury to the road, it was no concern of the government whether, proceeding under their road and across the road, the miners reached private property and in mining undermined that private property. The Placer Mining Act gives a remedy and provides for just such work if the placer miners become the owners and stakers of ground containing placer gold. As I have already said, the damage claimed was not damage caused to one using the highway. To close up the question viewed from the standpoint of the liability of a municipality governed by statute, I think that the government, perhaps, were negligent here in not stopping the work sooner, or that the government officials were probably negligent in not stopping the work sooner.

As to the question of the liability of the government under the doctrine of respondeat superior, I have already said that I find that they are not liable and for the following reasons. I have had myself to look into the matter and to find evidence to help me in arriving at the proper conclusion in this case, and I find that there is no levy made upon the residents of Bonanza or upon the residents of the Yukon Territory generally for the maintenance of public highways; that sums of money are yearly granted by the Federal Government at Ottawa and appropriated for the purpose of building roads. These moneys come into the hands of the Territory, and are yearly voted to such roads as the government sees fit to build, and in promotion of the public need and for the public convenience certain roads are built and certain roads are maintained or aban-

doned, at the will of the government. There is no statutory obligation either to build or maintain. As the legislature for the time see fit they grant aid to roads or build roads, and either abandon or maintain them according to their will. Neither by statute, then, nor by any right which owners of property acquire by virtue of paying assessment or rates, is the government bound to build or maintain public highways. Having built them and maintained them, are they liable for such cases as this?

In The Queen v. McFarlane, I think this matter has been very fully disposed of in the judgment of the Supreme Court, 7 S. C. R. 216. There Strong, J., says: "I am of opinion that this appeal must be allowed. The well-known case of Lord Canterbury v. The Queen establishes that the Crown is not liable for injuries occasioned by the negligence of its servants or officers, and that the rule respondeat superior does not apply in respect of the wrongful or negligent acts of those engaged in the public service. The case of Lane v. Cotton had in effect decided this, it having there been determined that the great officers of the Crown were not liable for the acts of subordinate officers whom they might employ to assist them in the execution of their offices. That was an action against the Postmaster-General, in which the plaintiff sought to recover for the negligence of a clerk in the post-office, who was the officer of the Postmaster-General and not of the Crown."

Mr. Justice Story, in his Commentaries on the Law of Agency, says: "It is plain that the government itself is not responsible for the misfeasances, wrongs, negligences, or omissions of duty of the subordinate officers or agents employed in the public service, for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, difficulties, and losses, which would be subversive of the public interests, and indeed laches are never imputable to the government."

And in the case of Gibbons v. United States, 8 Wallace 269, Mr. Justice Miller says: "But it is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the government responsible for the unauthorised acts of its officers, those acts being not themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorised exercise of power by its officers or agents."

The case of The Queen v. McLeod, 8 S. C. R. 1, upholds the same doctrine. I need not cite any part of that judgment more than to say that The Queen v. McFarlane was there considered and approved.

There are also the cases of McGregor v. Municipality of Harwich, 29 S. C. R. 443, and Halifax City R. W. Co. v. The Queen, 2 Ex. C. R., where it was held that, the action being founded in tort, no action could be maintained against the Crown; also City of Quebec v. The Queen, 3 Ex. C. R. 164; and Encyc. of the Laws of England, vol. 4, p. 106, on the question of remoteness of damages, where it was laid down that "the damage claimed must be the direct result of the defendant's act; he is not liable for any damage caused by facts or circumstances in connection with himself such as the spontaneous action of third persons." This I cite as authority on the supposition that it could be shewn, which is not shewn, that there was any statute which rendered the government in this Territory liable for the acts or their servants or rendered the government liable for the neglect of their servants in guarding against the acts of third persons on public highways. No such statute, so far as I can find—and I have been directed to none—exists which renders this Territory liable in any such manner. The only Act which we have at all relating to the matter is the Act regarding the public service, and by that Act certain officers are appointed, among them being a superintendent of works, who simply looks after the public works, submits estimates, and takes a general care, but nowhere is the government rendered liable for either misfeasance or nonfeasance. As I view the case and apply the doctrine of respondeat superior, it will not be necessary for me further to consider the question of negligence, or whether the work done by these miners under the government road was the proximate cause of the injury.

This judgment will be attached to the award which I will make, and will govern the award. The damages have been proved at the sum of $1,780.25, if damages were collectable. I have to fix the costs by the award, but I may say here that I think that the costs should be paid by the claimant, Mrs. Binette. Under the circumstances, the government may see fit not to press the collection of those costs.

WESTERN LAW REPORTER

CANADA

INDEX - DIGEST TO VOLUME XII.

(OCTOBER, 1909—JANUARY, 1910.)

ABANDONMENT.

See Contempt of Court — Vendor and Purchaser, 1.

ABSTRACT OF TITLE.

See Vendor and Purchaser, 2.

ACCOUNT.

See Contract. 3, 4, 9—Mortgage, 1, 3—Partnership, 1—Sale of Goods, 1.

ACKNOWLEDGMENT.

See Mortgage, 7.

ADJUSTER.

See Insurance, 2.

ADMINISTRATOR.

See Executors and Administrators—Master and Servant, 6.

ADMISSIONS.

See Company, 2.

ADOPTED CHILD.

See Distribution of Estates.

ADVERTISING.

See Medicine and Surgery, 1.

ADVOCATE.

See Sheriff.

AFFIDAVITS.

See Attachment of Debts—Company 2—Costs, 9—Husband and Wife, 4—Judgment, 1—Small Debts Court.

AGENT.

See Insurance, 2—Mortgage, 7—Principal and Agent—Railway, 2—Sale of Goods, 4—Settlement of Action.

AGISTMENT.

See Animals.

AGREEMENT.

See Contract.

AGREEMENT FOR LEASE.

See Landlord and Tenant, 1.

ALBERTA LOCAL IMPROVEMENT ACT.

See Assessment and Taxes, 1.

ALIMONY.

See Husband and Wife, 1.

AMENDMENT.

See Company, 2 — Contract, 10—Land Titles Act, 1—Landlord and Tenant, 4—Practice—Promissory Notes, 1—Railway, 2—Vendor and Purchaser, 5.

ANIMALS.

Agistment — Lien — Absence of Agreement—Common Law Right—Implication of Law: Morrison v. Bryan (Sask.), 415.

See Criminal Law, 4—Damages—Fraud and Misrepresentation, 2 — Railway, 7.

APPEAL.

1. To Saskatchewan Supreme Court en Banc—Leave to Appeal — Order of Committal for Contempt of Court—Disobedience of Injunction — Necessity for Purging Contempt before Applying to Court—Criminal Matter: Moose Mountain Lumber and Hardware Co. v. Paradis (Sask.), 424.

2. To Yukon Territorial Court en Banc —Stay of Execution pending Appeal —Terms — Special Circumstances— Return of Moneys Paid out of Court pursuant to Judgment — Practice: Olsen v. Desjarlais (Y.T.), 467.

See Costs, 10, 13 — Liquor Licenses— Railway, 4 — Small Debts Court— Trial.

APPEARANCE.

See Parties, 2.

ARBITRATION AND AWARD.

See Costs, 15—Crown—Railway, 4.

ARCHITECT.

See Contract, 9.

ASSESSMENT AND TAXES.

1. Alberta Local Improvement Act, 1907, sec. 91—Liability of Land Company, Entitled to Patent for Land, to Assessment before Patent — Dominion Railway Land Grant — Property of the Crown—B. N. A. Act, sec. 125 —Beneficial Interest in Company— Legal Estate in Crown—"Belonging to"—Charge in Favour of Crown—Forfeiture—Personal Assesment—Interest in Land: Re Confirmation of Local Improvement Tax Return (Alta.), 573.

2. School Taxes—Distress for Arrears— Liability for Taxes—Crown Lands— Interest in — Lawful Seizure of Horses on Land—Excessive Seizure —Damages: Robertson v. Hopper (Sask.), 5.

3. Tax Sale—Lapse of 10 Years from Making of Levy — Real Property Limitation Act, secs. 11, 24—Application to "Proceeding" to Sell for Taxes — Assessment Act, sec. 40— Lien for Taxes — Enforcement: Royce v. Municipality of Macdonald (Man.), 347.

See Injunction, 2 — Public Schools— Vendor and Purchaser, 11.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See Bankruptcy and Insolvency—Land Titles Act, 2.

ASSIGNMENT OF CHOSE IN ACTION.

See Chose in Action.

ASSIGNMENT OF CONTRACT.

See Vendor and Purchaser, 14.

ASSIGNMENT OF JUDGMENT.

See Solicitor.

ASSIGNMENTS ACT.

See Bankruptcy and Insolvency—Land Titles Act, 2.

ATTACHMENT OF DEBTS.

Affidavit to Lead Garnishing Order — Practice—Departure from Forms Prescribed — Rule 769—"Deductions" — "Discounts" — "Jointly" —"Justly:" Johnson v. Chalmers (Man.), 506.

See Solicitor.

ATTORNEY-GENERAL.

See Criminal Law, 1.

BAILMENT.

See Sale of Goods, 1.

BANKRUPTCY AND INSOLVENCY.

1. Assignment for Benefit of Creditors— Action by Assignee for Return of Goods Transferred by Insolvent before Assignment—Title of Transferee —Pledge for Advances—Conspiracy to Defraud Creditors: Newton v. Rein (Man.), 490.

2. Assignment for Benefit of Creditors— Action by Assignee to Set aside Conveyance of Land Made within Sixty Days of Assignment—Absence of Intent to Prefer—Setting aside Conveyance — Incumbrances — Interest— Use and Occupation — Charges on Land — Parties — Costs: Smith v. Sugarman (Alta.), 585.

3. Assignment for Benefit of Creditors— Action by Assignee to Set aside Transfer of Moneys by Insolvent as Preferential and Void — Evidence— Intent — Knowledge of Insolvency— Correspondence—Recovery of Moneys Transferred: Jagger v. Turner & Co. Limited (Sask.), 588.

4. Assignments Act — Company—Transfer of Land and Assignment of Personal Property by Insolvent Company — Knowledge of Transferee— Intent to Prejudice and Delay Creditors: Belcher v. Hudsons Limited (Sask.), 25.

See Company—Land Titles Act, 2.

BILLS AND NOTES.

See Cheque—Fraud and Misrepresentation, 2—Partnership, 2—Promissory Notes—Sale of Goods, 5.

BILLS OF LADING.

See Railway, 2—Sale of Goods, 2.

BILLS OF SALE.

See Injunction, 1—Judgment, 3.

BOARD OF RAILWAY COMMISSIONERS.

See Railway, 2, 3.

BRIDGE.

See Contract, 3.

BUILDING CONTRACT.

See Contract, 7, 9.

BY-LAWS.

See Municipal Corporations.

CANCELLATION OF CONTRACT.

See Vendor and Purchaser, 1, 3, 5, 6, 12, 13.

CANCELLATION OF LICENSE.

See Liquor Licenses.

CARRIERS.

See Negligence, 2—Railway, 1.

CAVEAT.

See Injunction, 3—Land Titles Act, 1.

CERTIFICATE OF TITLE.

See Land Titles Act, 2.

CERTIORARI.

See County Courts — Municipal Elections.

CHAMPERTY.

See Solicitor.

CHARGE ON LAND.

See Assessment and Taxes, 1 — Bankruptcy and Insolvency, 2—Mortgage.

CHARGING ORDERS.

See Money in Court.

CHATTEL MORTGAGE.

See Sale of Goods, 3.

CHEQUE.

Procurement by Misrepresentations—Indorsement to Third Person—Holder in Due Course — Value — Notice of Infirmity in Title—Bills of Exchange Act: Campbell v. National Construction Co. (B.C.), 152.

CHOSE IN ACTION.

Assignment of—"Lien Note"—Absolute Assignment—Notice to Person Liable to Pay—Letter — Sufficiency—Pleading — Contract—Sale of Horse—Representation — Pedigree—Warranty —Damages—Set-off: Imperial Bank of Canada v. Georges & Son, Georges & Son v. Kidd (Alta.), 398.

COLLUSION.

See Husband and Wife, 4.

COMMISSION.

See Evidence—Principal and Agent.

COMMISSIONER OF EDUCATION.

See Public Schools.

COMMITTAL.

See Small Debts Court.

COMMON GAMING HOUSE.

See Money Lent.

COMPANY.

1. Winding-up—Contributories — Shares Appearing to be Paid in Part—Onus on Shareholders to Shew Payment in Full—Transfer of Goodwill Asset —Agreement to Release from Liability—Power of Company — Promotion Shares — Dividend Paid when Company Insolvent—Application to Payment of Shares—Illegality: Re Northern Constructions Limited (Man.), 618.

2. Winding-up — Petition for Order — Practice—Dominion Winding-up Act —Statutory Requirements—Affidavit Verifying Petition — English Rules —North-West Territories Rules — Proof of Insolvency — Admissions of Servants—Acknowledgment of Com-

pany — Amendment of Petition: Re Outlook Hotel Co. Limited (Sask.), 181.

See Bankruptcy and Insolvency, 4 — Costs, 9—Evidence — Execution, 1—Municipal Elections — Promissory Notes, 2.

COMPENSATION.

See Executors and Administrators — Municipal Corporations, 2—Railway, 3, 4—Vendor and Purchaser, 6, 10.

CONDITIONAL SALE.

See Principal and Surety — Sale of Goods, 3.

CONSPIRACY.

See Bankruptcy and Insolvency, 1.

CONSTITUTIONAL LAW.

See Assessment and Taxes, 1—Master and Servant, 3.

CONTEMPT OF COURT.

Disobedience of Injunction — Motion to Commit Defendant—Service of Original Order with Summons to Continue — Indorsement of Memorandum Prescribed by Rule 330—Restraining Order—Original not Shewn when Service Effected—Knowledge of Defendant of Order and that Plaintiffs Intended to Pursue it—Appearance of Counsel on Summons—Delay in Serving Continuing Order—Presumption of Abandonment—Practice: Moose Mountain Lumber and Hardware Co. v. Paradis (Sask.), 310.

See Appeal, 1.

CONTRACT.

1. Agreement to Pay Money in an Uncertain Event—Illegality—Wager: DeJardin v. Roy (Sask.), 704.

2. Boat Built by Defendant for Plaintiff—Dispute as to Price—Refusal of Defendant to Deliver Boat—Action for Detention—Counterclaim for Extras and Ground Rent—Damages: Allan v. MacEachern (B.C.), 646.

3. Erection of Bridge for Municipal Corporation—Contract Declared Forfeit by Engineer — Work Completed by Corporation — Construction of Forfeiture Clause—Right of Contractors to Recoupment of Moneys Expended on Plant and Preparation for Work —Benefit Accruing to Corporation—Indemnity against Loss—Account—Difference between Contract Price and Cost of Completing Work—Acceptance of Bridge—Waiver of Certificate: Buchanan v. City of Winnipeg, Stewart v. City of Winnipeg (Man.), 613.

4. Exchange of Properties — Conditions —Account—Claim and Counterclaim — Costs: Dodulitz v. Krainean (Sask.), 1.

5. Formation — Correspondence—Breach —Sale of Goods—Measure of Damages — Price at which Goods Obtainable—Freight Rate — Costs: Rex Fruit Co. v. Anderson (Alta.), 167.

6. Money Paid for Interest in Land—Syndicate — Change in Contract — Absence of Assent — Return of Moneys Paid—Evidence: Drury v. Dart (Man.), 520.

7. Parol Evidence to Vary—Statute of Frauds—Written Agreement to Build House — Contemporaneous Oral Agreement to Accept Conveyance of Land as Part of Price — Consistent Agreements Standing together—Offer to Convey — Lien on Land for Amount Overpaid and Costs—Reformation of Contract—Form of Judgment: Eaton v. Crook (Alta.), 658.

8. Services of Physician to Servants of Defendants — Payment according to Number of Men Employed—Computation—Evidence—Average: Mackenzie v. Newman (Man.), 631.

9. Supply of Work and Materials for Building — Architect's Certificate—Waiver—Promissory Note — Account Items—Evidence: Gamble v. Arnold (Sask.), 91.

10. Transfer of Agency for Sale of Goods —Agreement to Pay Percentage on Goods Sold by Transferee—Breach of Contract—Conditional Cause of Action—Pleading—Amendment: Anderson v. Olson (Sask.), 262.

See Animals — Chose in Action—Guaranty — Insurance — Interpleader — Landlord and Tenant—Master and Servant, 7, 8, 9—Mines and Minerals, 3—Mortgage — Parties — Principal and Agent—Railway, 1, 2, 3—Sale of Goods — Solicitor—Vendor and Purchaser.

CONTRIBUTORIES.

See Company.

CONTRIBUTORY NEGLIGENCE.

See Master and Servant, 2, 4—Railway, 5.

CONVERSION.

See Landlord and Tenant, 4—Sale of Goods, 1, 3.

CONVICTION.

See Criminal Law.

COSTS.

1. Action Defended by Solicitor Remunerated by Salary — Right of Defendants to Tax Costs against Unsuccessful Plaintiff — Indemnity—Liability: Stephens v. City of Calgary (Alta.), 379.

2. Defamation — Verdict for Nominal Damages — Right to Award Costs—Discretion of Trial Judge and Court of Appeal—King's Bench Act, Rule 931 (a)—Libel Act, R. S. M. 1902 ch. 97, sec. 13—7 & 8 Edw. VII. ch. 12, sec. 3—9 Edw. VII. ch. 30, sec. 2 — Repeal and Interpretation of statutes: Shillinglaw v. Whillier (Man.), 128.

3. Master and Servant—Injury to Servant—Action at Common Law with Claim under Workmen's Compensation Act—Failure of Action—Admission of Liability under Act—Disposition of Costs — Event — Discretion: Wilson v. Kelly (B.C.), 160.

4. Scale of Costs—County Court Action—Amount Involved between $500 and $1,000 — Increased Counsel Fees — Rule 589: Blundell v. Anglo-American Fire Insurance Co. (B.C.), 164.

5. Scale of Costs—Miners' Lien Ordinance—Provisions as to Costs—Practice — Discretion — Several Lienholders Joining in one Proceeding: Lareau v. Olsen (Y.T.), 465.

6. Scale of Costs—Taxation — Set-off — Tariff—Item 95: Little v. Whiteley (Alta.), 211.

7. Security for Costs—Action for Libel—R. S. M. 1902 ch. 97, sec. 10—Increased Security — Practice — Order for Security — Terms — Dismissal of Action in Default—King's Bench Act, Rule 978—Amount of Security—Limitation — Discretion: Adcock v. Manitoba Free Press Co. (Man.), 142.

8. Security for Costs—Interpleader Issue —Defendants in Issue out of Jurisdiction: Gowan v. Kolcheu (Alta.), 211.

9. Security for Costs—Libel Act, sec. 10—Corporation Defendant — Affidavit made by Officer — Sufficiency — Increased Security — Rules 982, 983, 987—Dismissal of Action — Practice: Adcock v. Manitoba Free Press Co. (Man.), 362.

10. Security for Costs—Order for—Refusal to Stay Proceedings—Discretion —Appeal—Order Appealed from not Drawn up—Practice: Wray v. Canadian Northern R. W. Co. (Sask.), 14.

11. Security for Costs—Plaintiff Temporarily out of the Jurisdiction—Intention to Return: Richards v. Verrinder (B.C.), 527.

12. Security for Costs—Proceeding under the Workmen's Compensation Act pending before Arbitrator — Application to Judge in Chambers—Forum—Nominal and Insolvent Plaintiff—Administrator of Deceased Workman: Re Kruz and Crow's Nest Pass Coal Co. (B.C.), 158.

13. Taxation of Costs — Claim and Counterclaim — Judgment — Construction of — Method of Taxation—Set-off — Appeal: Kelly v. City of Winnipeg (Man.), 49.

14. Taxation of Costs—Sheriff's Costs of Interpleader—Copy of Examination of Claimant—Counsel Fee on Motion—Items 76 and 77 of Tariff: Cross v. Cross (Sask.), 433.

15. Workmen's Compensation Act, 1902 —Case Stated by Arbitrator—Costs of—Jurisdiction: Re Darnley and Canadian Pacific R. W. Co. (B.C.), 67.

See Bankruptcy and Insolvency, 2—Contract, 4, 5, 7—Execution, 1—Executors and Administrators — Husband and Wife, 1 — Landlord and Tenant, 2, 4—Mortgage, 3, 6—Municipal Elections — Negligence, 2 —Parties — Railway, 7—Sale of Goods, 1—Solicitor — Vendor and Purchaser, 7.

COUNSEL FEES.

See Costs, 4, 14.

COUNTERCLAIM.

See Contract, 2, 4—Costs, 13—Landlord and Tenant, 4—Pleading, 1—Vendor and Purchaser, 5.

COUNTY COURT JUDGE.

See County Courts—Criminal Law, 2.

COUNTY COURTS.

Territorial Jurisdiction — Judicial Districts and Divisions—County Courts Act—Order of County Court Judge Quashing License — Situation of Licensed Premises—Liquor License Act, sec. 19—Certiorari: Re Somerville (Man.), 633.

See Costs, 4.

COURT OF REVISION.

See Municipal Elections.

COURTS.

See Appeal — County Courts — Small Debts Court.

COVENANTS.

See Landlord and Tenant, 2, 4—Vendor and Purchaser, 5, 10.

CREDITORS.

See Bankruptcy and Insolvency — Injunction, 1.

CREDITORS' RELIEF ORDINANCE.

See Money in Court.

CRIMINAL LAW.

1. Charge Preferred by Deputy of Attorney-General for Province — Absence of Consent or Direction of Trial Judge or Attorney-General—Authority of Deputy—Criminal Code, sec. 673 (a)—Necessity for Preliminary Inquiry before Magistrate: Rex v. Duff (Sask.), 290.

2. Habeas Corpus—Conviction by County Court Judge—Defendant Held pending Hearing of Reserved Case — Court of Appeal not Holding Session at Usual Time—Application for Discharge: Rex v. Prasiloski (B.C.), 162.

3. Libel—Anonymous Letters—Question whether Written by Accused—Evidence—Comparison of Handwriting with Letters Admittedly Written by Accused—Evidence of Experts—Evidence of Ill-will towards Person Libelled — Motive — Judge's Charge — Reference to Similarity in Style —Misdirection—Evidence Improperly Admitted — Discharge of Accused: Rex v. Law (Man.), 475.

4. Theft of Cattle—Criminal Code, sec. 989 — Branding — Evidence — New Trial: Rex v. Dubois (Alta.), 560.

5. Vagrancy — Prostitute not Giving Satisfactory Account of herself — Plea of Guilty—Conviction—Request not Disclosed—Summary Trial—Habeas Corpus: Rex v. Pepper (Man.), 58.

See Medicine and Surgery—Money Lent.

CROPS.

See Damages—Landlord and Tenant, 4 —Railway, 7.

CROWN.

Government of Yukon Territory—Liability for Acts or Omissions of Officers or Servants — Respondeat Superior — Government Highway — Subsidence — Mining Operations — Injury to Private Property — Arbitration and Award: Re Binette (Y.T.), 730.

See Assessment and Taxes, 1, 2—Injunction, 4.

CUSTOM.

See Master and Servant, 9—Sale of Goods, 2.

DAMAGES.

Railway—Removal of Fence—Neglect to Rebuild—Animals Pasturing on Unfenced Land—Destruction of Crop —Measure of Damages—Difference between Probable and Actual Yield —Duty of Land Owner to Mitigate Damages — Trespass — Entry on Land — Agreement — Value of Land—Expropriation: Brox v. Edmonton Yukon and Pacific R.W. Co. (Alta.), 176.

See Assessment and Taxes, 2—Chose in Action—Contract, 2, 5—Costs, 2—Defamation, 2—Execution, 1—Fire—Fraud and Misrepresentation, 1, 2 —Mines and Minerals, 6—Municipal Corporations, 1, 8—Negligence, 1, 2 —Pleading, 1—Public Schools—Railway, 5, 7—Sale of Goods, 3—Trespass, 1, 2—Vendor and Purchaser, 5.

DEDICATION.

See Railway, 3.

DEED.

See Bankruptcy and Insolvency, 2.

DEFAMATION.

1. Libel — Privilege — Express Malice — Interrogatories — Particulars — Practice: Timmons v. National Life Assurance Co. (Man.), 492.

2. Libel and Slander — Privilege — Evidence of Malice or Indirect Motive —Truth or Falsity of Defamatory Words—Judge's Charge — Damages: Schaefer v. Schwab (Man.), 338.

See Costs, 2, 7, 9—Criminal Law, 3.

DEPUTY ATTORNEY-GENERAL.

See Criminal Law, 1.

DEPUTY COMMISSIONER OF EDUCATION.

See Public Schools.

DETINUE.

See Contract, 2.

DIRECTORS.

See Promissory Notes, 2.

DISTRESS.

See Assessment and Taxes, 2—Public Schools.

DISTRIBUTION OF ESTATES.

Intestate Estate of Person Domiciled in Alberta—Right of Child Adapted in Foreign State to Share in Estate—Law of Country where Status Originated — Private International Law: Re Throssel (Alta.), 683.

DIVORCE.

See Husband and Wife, 4.

DOMICILE.

See Distribution of Estates.

EASEMENT.

See Railway, 3.

ELECTION.

See Vendor and Purchaser, 7, 9.

ELECTIONS.

See Municipal Elections — Public Schools.

EMPLOYERS' LIABILITY INSURANCE.

See Master and Servant, 1.

EQUITABLE EXECUTION.

See Money in Court.

ESTOPPEL.

See Insurance, 2—Railway, 2.

EIVDENCE.

Foreign Commission — Examination abroad of Officers of Plaintiffs as Witnesses on their Behalf—Refusal of Order — Fraud — Necessity for Examination of Witnesses in Open Court: Union Investment Co. v. Perras (Alta.), 76.

See Contract, 6-9—Criminal Law, 3, 4 —Defamation—Husband and Wife, 3—Master and Servant, 1, 8—Medicine and Surgery, 2—Mines and Minerals, 6—Money Lent — Negligence, 1—Partnership, 1—Payment —Promissory Notes, 2—Railway, 4, 6—Vendor and Purchaser, 14.

EXCHANGE OF PROPERTY.

See Contract, 4—Fraud and Misrepresentation, 1—Principal and Agent, 1—Vendor and Purchaser, 10.

EXECUTION.

1. Action against Sheriff for Trespass—Illegal Breaking of Outer Door of Dwelling-house — Damages—Claim to Goods Seized — Assignment by Company—Powers of Company—Resolution—Transfer of Land—Unfulfilled Conditions — Interpleader—Protection of Sheriff—Costs: Hudson v. Fletcher (Sask.), 15.

2. Exemption—"Books of a Professional Man"—Subject Matter of Judgment—Books Specifically Paid for—Exemption Ordinance, sec. 2, subsec. 6; sec. 4: Canada Law Book Co. v. Fieldhouse (Alta.), 396.

See Appeal, 2—Husband and Wife, 3—Land Titles Act, 1, 2 — Sheriff — Vendor and Purchaser, 3.

EXECUTION CREDITORS.

See Money in Court.

EXECUTORS AND ADMINISTRATORS.

Lease of Hotel by Administratrix for Seven Years with Option of Purchase—Assignment — Registration —Land Titles Act, secs. 47, 54, 76, 135 — Breach of Trust—Notice to Lessee—Option Clause Void—Effect of Registration — Expenditure by Lessee — Compensation — Administration Order — Costs: St. Germain v. Reneault (Alta.), 169.

See Costs, 12—Master and Servant, 6.

EXEMPTION.

See Execution, 2.

EXPERTS.

See Criminal Law, 3.

EXPROPRIATION.

See Damages—Municipal Corporations, 2—Railway, 4.

FALSE ARREST.

See Pleading, 2.

FEES OF SHERIFF.

See Sheriff.

FENCES.

See Damages—Railway, 7—Trespass, 1.

FIRE.

Accidental Starting on Defendant's Land —Escape to Plaintiff's Land Adjoining — Negligence — Prairie Fires Ordinance, sec. 2, sub-sec. 1; secs. 4, 9—"Letting" — "Permitting" — Liability — Damages: Moseley v. Ketchum (Sask.), 721.

See Negligence, 2.

FIRE INSURANCE.

See Insurance.

FORECLOSURE.

See Mortgage, 2, 3, 4.

FOREIGN COMMISSION.

See Evidence.

FORFEITURE.

See Assessment and Taxes, 1—Contract, 3—Landlord and Tenant, 2—Vendor and Purchaser, 8.

FRAUD AND MISREPRESENTATION.

1. Exchange of Lands—Misrepresentations Relied on—Rescission of Conveyances — Damages: Thompson v. Pepper (Man.), 490.

2. Sale of Horse—Delivery of Inferior Animal — Promissory Notes Given for Price — Payment after Knowledge of Fraud—Damages—Measure of—Difference in Value—Interest—Money Spent on Training of Horse —Possibility of Profits: Perry v. Kidd (Sask.), 9.

See Bankruptcy and Insolvency — Cheque — Evidence — Guaranty — Municipal Corporations, 5—Railway, 3—Vendor and Purchaser, 5, 14.

FREIGHT.

See Railway, 1.

GAMING.

See Money Lent.

GARNISHMENT.

See Attachment of Debts.

GOVERNMENT HIGHWAY.

See Crown.

GUARANTY.

Joint and Several Contracts — Material Alteration in Instrument after Execution by two or four Guarantors —Release of all four Guarantors—Husband and Wife—Wife Executing without Independent Advice—Absence of Explanation — Fraud—Circumstances to put Plaintiffs on Inquiry—Non est Factum: Canada Furniture Co. v. Stephenson (Man.), 603.

HABEAS CORPUS.

See Criminal Law, 2, 5.

HACKMEN.

See Municipal Corporations, 1.

HIGHWAY.

See Crown—Railway, 3.

HOMESTEAD.

See Land Titles Act, 1.

HUSBAND AND WIFE.

1. Alimony—Unsuccessful Action for—Costs of Plaintiff—Refusal to Order Payment by Defendant—Conduct of Action by Solicitors for Plaintiff: Keizer v. Keizer (Alta.), 89.

2. Ante-nuptial Marriage Contract—Provision for Division of Trust Fund upon Separation—Public Policy—Appointment of Trustee: Nelson v. Nelson (B.C.), 150.

3. Business Carried on by Husband in Firm Name — Seizure of Stock in Trade under Execution — Claim of Ownership Made by Wife — Interpleader Issue — Evidence — Finding that Business that of Husband: Burton v. Merchants Bank of Canada (Sask.), 239.

4. Petition by Wife for Judicial Separation — Practice — Divorce Rules — Ex Parte Motion for Directions as to Trial, Husband not Appearing in Answer to Citation — Absence of Affidavit Denying Collusion—Necessity for Filing Citation with Certificate and Affidavit of Service: Timms v. Timms (B.C.), 529.

See Guaranty—Mortgage, 7—Municipal Corporations, 8.

ILLEGAL CONTRACT.

See Contract, 1 — Insurance, 1 — Money Lent.

IMMORAL CONDUCT.

See Master and Servant, 7.

IMPROVEMENTS.

See Vendor and Purchaser, 6.

INDEMNITY.

See Contract, 3—Costs, 1—Parties.

INDEPENDENT ADVICE.

See Guaranty.

INJUNCTION.

1. Impeaching Bill of Sale—Action under Preferential Assignments Act and 13 Eliz. ch. 5 — Simple Contract Creditor—Right to Restrain Defendants from Dealing with Property — No Proof of Existence of other Creditors: Lankin v. Walker (Sask.), 320.

2. Interim Order — Application for — Restraining Municipal Corporation from Levying Tax — Right to Recover Amount if Paid under Protest: Dominion Express Co. v. City of Brandon (Man.), 498.

3. Interim Order — Application to Continue — Practice — Notice of Motion or Summons — Ex Parte Application — Material Facts Withheld —Vendor's Lien — Land Titles Act —Caveat—"Just or Convenient"—Lis Pendens: Bashford v. Bott (Sask.), 428.

4. Right of Property in Gravel Taken from Bed of Stream — Ownership of Crown — Possession — Labour Expended in Removing Gravel — Jus Tertii—Severance from Realty: Edmonton Concrete Co. v. Cristall (Alta.), 562.

See Appeal, 1 — Contempt of Court — Municipal Corporations, 1, 3-6 — Municipal Elections.

INSOLVENCY.

See Bankruptcy and Insolvency — Company.

INSURANCE.

1. Fire Insurance — Illegal and Immoral Contract — Premises Occupied as a "Sporting House" — Intention — Voidable Contract—Public Policy—Unoccupied Premises — Changes Material to the Risk: Morin v. Anglo-Canadian Fire Insurance Co. (Alta.), 387.

2. Fire Insurance — Sale of Property Insured — Property Passing — Terms of Contract — Insurable Interest — Statutory Conditions — Change Material to the Risk—Notice to Agent — Fire Occurring Shortly after Change — Assignment without Permission — Rights of Assignee — Authority of Adjuster — Estoppel—Subrogation — Proofs of Loss: Trotter and Douglas v. Calgary Fire Insurance Co. (Alta.), 672.

See Master and Servant, 1.

INTEREST.

See Bankruptcy and Insolvency, 2 — Fraud and Misrepresentation, 2 — Vendor and Purchaser, 5, 7.

INTERPLEADER.

Application by Stakeholder—Contract—Wager — Form of Order — Issue — Onus — Parties: Re Hyndman (Alta.), 166.

See Costs, 8, 14—Execution, 1 — Husband and Wife, 3—Judgment, 3.

INTERROGATORIES.

See Defamation, 1.

INTOXICATING LIQUORS.

See Liquor Licenses — Municipal Corporations, 3-6.

JOINDER OF PARTIES.

See Parties.

JOINT CONTRACT.

See Parties.

JUDGMENT.

1. Default of Defence—Motion for Judgment on Statement of Claim—Application for Leave to Defend—Affidavit of Merits Made by Solicitor — Insufficiency — Question of Law Appearing on Face of Statement of Claim — Terms: Miller v. Ross (Sask.), 315.

2. Default of Defence—Service of Statement of Claim by Publication—Action for Declaration of Trusteeship of Lands and to Transfer Title to Plaintiff — Refusal to Grant Judgment: Howard v. Lawson (Man.), 213.

3. Summary Judgment — Rule 326—Action to Set aside Bill of Sale—Finding on Trial of Interpleader Issue—Adoption on Motion for Judgment: Varley v. Duvall (Alta.), 378.

4. Summary Judgment—Rule 326—Scope of — Judgment before Appearance—Grounds for — Practice: Tuckett Cigar Co. v. Wickett (Alta.), 210.

See Contract, 7—Costs, 13—Solicitor—Vendor and Purchaser, 2.

JUDICIAL SALE.

See Vendor and Purchaser, 11.

JUDICIAL SEPARATION.

See Husband and Wife, 4.

JURISDICTION.

See Costs, 15—County Courts — Medicine and Surgery, 1 — Municipal Elections—Small Debts Court.

JURY.

See Master and Servant, 1—Railway, 6 —Trial.

JUS TERTII.

See Injunction, 4.

LACHES.

See Vendor and Purchaser, 14.

LAND TITLES ACT.

1. Caveats—Motions to Set aside—Summary Procedure—Discharge of Caveats—Discretion—Mortgage of Homestead — Execution—Title Registered in the Name of another Person—Mistake in Name—Amendment: Re Gaar Scott Co. and Giguère (Sask.), 245.

2. Certificate of Title — Registration of Executions against Lands — Assignment by Execution Debtor for Benefit of Creditors—Assignments Act—Right of Assignee to Certificate of Title Freed from Executions: Re Brooks (Sask.), 303.

3. Instrument not Registrable—Mortgage or Incumbrance — Specific Description of Lands—Inclusion of other Lands not Described — Non-Compliance with sec. 98: Re North-West Telephone Co. (Sask.), 300.

See Executors and Administrators—Injunction, 3 — Railway, 3—Sheriff—Vendor and Purchaser, 11.

LANDLORD AND TENANT.

1. Agreement for Lease — Possession—Subsequent Agreement under Seal—Operation as Lease — Surrender of Previous Tenancy—Overholding Tenant — Detention of Premises: Boyd v. Naismith (Sask.), 233.

2. Lease — Breach of Covenants — Subletting without Leave—Alteration of Premises without Consent of Lessor — Forfeiture — Relief against — Terms—Costs: Royal Trust Co. v. Bell (Alta.), 546.

3. Lease — Dispute as to Provisions — Expiry of Terms—Notice to Quit—Overholding Tenant: Von Ferber v. Enright (Man.), 216.

4. Lease of Farm — Rent Payable by Share of Crops—Seizure of Crops by Landlord — Conversion of Tenant's Share — Breach of Covenants — Cancellation of Lease—Counterclaim for Instalment of Purchase Money of Land—Assignment of Agreement — Amendment — Costs: Sutton v. Hinch (Man.), 500.

See Executors and Administrators.

LEASE.

See Executors and Administrators — Landlord and Tenant.

LEAVE TO APPEAL.

See Appeal.

LIBEL.

See Costs, 7, 9 — Criminal Law, 3 — Defamation.

LICENSE.

See Liquor Licenses — Vendor and Purchaser, 6.

LIEN.

See Animals—Assessment and Taxes, 3 —Contract, 7 — Costs, 5 — Injunction, 3 — Mechanics' Liens — Mines and Minerals — Mortgage, 2—Sale of Goods, 3—Solicitor—Vendor and Purchaser, 10.

LIEN NOTES.

See Chose in Action—Sale of Goods, 3.

LIMITATION OF ACTIONS.

See Assessment and Taxes, 3 — Mortgage, 2, 7.

LIQUOR LICENSES.

Cancellation of License—Order of Court — Appeal to Supreme Court of Canada — Perfecting Security — Effect on License — Application for Renewal — Necessity for Recommendation: Re Richelieu Hotel License (Alta.), 72.

See County Courts — Municipal Corporations, 3-6.

LIS PENDENS.

See Injunction, 3.

LOCAL IMPROVEMENTS.

See Assessment and Taxes, 1.

LOCAL OPTION BY-LAW.

See Municipal Corporations, 3-6.

MARRIAGE CONTRACT.

See Husband and Wife, 2.

MASTER AND SERVANT.

1. Injury to Servant—Action for Compensation—Trial — Suggestion to Jury that Defendant Insured against Accidents to Workmen — New Trial — Evidence: Hyndman v. Stephens (Man.), 46.

2. Injury to Servant — Electric Tramway — Dangerous Work — Knowledge of — Structural Defect—Risk Voluntarily Incurred — Negligence —Contributory Negligence: Barnes v. British Columbia Copper Co. (B.C.), 68.

3. Injury to Servant — Employment by Contractors for Construction of Dominion Railway — Workmen's Compensation Act of Alberta — Application — Public Works Health Act (Dominion)—Conflict: Re Murray and Foley (Alta.), 537.

4. Injury to Servant — Negligence — Contributory Negligence — Master's Knowledge of Danger — Servant's Knowledge — Taking Chances — Volenti non Fit Injuria: Tapoila v. Harding (Y.T.), 188.

5. Injury to Servant — Negligence — Mine — Dangerous Condition — Warning — Defects in Arrangement: Houlihan v. Yukon District Gold Mining Co. (Y.T.), 110.

6. Injury to Servant — Workmen's Compensation for Injuries Act—Status of Administratrix as Plaintiff in Action under—Letters of Administration Granted by Manitoba Court —Cause of Action Arising in Ontario—Application of Ontario Statute —Time-limit: Johnson v. Canadian Northern R. W. Co. (Man.), 124.

7. Wages—Action for, by Assignees of Servant — Defence — Grossly Im-

moral Conduct of Servant Disentitling him to Wages: Wood v. Barker (Sask), 225.

8. Wages — Contract of Hiring — Dispute as to Terms — Engineer of Ship — Evidence: Waltenbaugh v. The "Pauline" (Ex. Ct. Can.), 206.

9. Wages—Contract of Hiring—Monthly Hiring — Notice — Custom: Andrews v. Pacific Coast Coal Mines Limited (B.C.), 163.

See Costs, 3, 12, 15—Crown—Municipal Corporations, 8—Railway, 6.

MECHANICS' LIENS.

Preservation of Lien — Work Done by Sub-contractor after Time for Filing Lien Expired—Attempt to Preserve Lien—Sub-contractor Going on Premises in Spite of Notice Forbidding him — Trespass — Mechanics' Lien Act, secs. 4, 7: Sherritt v. McCallum (B.C.), 637.

MEDICINE AND SURGERY.

1. Saskatchewan Medical Profession Act — Advertising to Give Advice in Medicine—Unregistered Practitioner —Osteopathy — Evidence — Police Magistrate — Jurisdiction — Depositions not Taken before Summons Issued — Criminal Code, sec. 655, Amended: Rex v. Raffenberg (No. 1) (Sask.), 419.

2. Saskatchewan Medical Profession Act —Practising Midwifery — Unregistered Practitioner — Evidence — Isolated Act: Rex v. Raffenberg (No. 2) (Sask.), 421.

See Contract, 8.

MERGER.

See Vendor and Purchaser, 10.

MIDWIFERY.

See Medicine and Surgery, 2.

MINERS' LIENS.

See Mines and Minerals.

MINES AND MINERALS.

1. Adverse Claim—Staking—Quartz Regulations, sec. 53 — Certificate of Work—Impeaching by Junior Locator—Plan of Survey — Defects in: Balton v. Evans (Y.T.), 116.

2. Mineral Claim—Adverse Right—Plan of Survey—Invalidity—Quartz Mining Regulations — Staking — Field Notes—Topographical Indications—Contesting Location after Issue of Grant—Possession: Lloyd v. Nicholas (Y.T.), 38.

3. Miners' Liens—Contract — Trespass: Lareau v. Olsen (Y.T.), 462.

4. Miners' Liens — Wages — Lien not Filed in Time—Preservation of Lien —Occasional Services: Baxter v. Senkler (Y.T.), 463.

5. Miners' Liens — Wages — Services as Foreman—Lien Filed too Late with Regard to Period of Service—Subsequent Services as Watchman — No Right to Lien for—Voluntary Services Enhancing Value of Mine—Service of Originating Summons: Kerruish v. Senkler (Y.T.), 324.

6. Trespass to Placer Mining Claim—Justification—Entry as of Right—Grouping of Mining Claims—Partnership for Specific Purposes of Doing Representation Work—Yukon Placer Mining Act, sec. 37—Evasion of Statutory Duty — Payment of Debt or Expenses—Damages—Value of Ore Mined—Cost of Severance—Evidence: Olsen v. Desjarlais (Y. T.), 455.

See Costs, 5—Crown—Master and Servant, 5.

MISDIRECTION.

See Criminal Law, 3.

MISREPRESENTATION.

See Fraud and Misrepresentation.

MISTAKE.

See Land Titles Act, 1—Parties, 4—Sale of Goods, 3—Vendor and Purchaser, 6, 7.

MONEY IN COURT.

Right of Execution Creditors of Party Entitled — Practice — Stop Orders —Charging Orders—Equitable Execution — Orders Made before Payment into Court—Effect when Money Paid in—Creditors' Relief Ordinance —Payment to Sheriff: McDougall & Secord v. Inglis (Alta.), 78.

See Appeal, 2.

MONEY LENT.

Action for Return — Illegal Purpose—Gaming—"Poker"—Common Gaming House — Evidence — Criminal Code, sec. 226—Banker—9 Anne ch. 14—5 & 6 Wm. IV. ch. 41—12 Geo. II. ch. 28: Rose v. Collison (Alta.), 648.

MORTGAGE.

1. Account — Reference — Scope of Inquiry — Moneys Received by Mortgagees or which ought to have been Received under Trust Agreement with Mortgagor: Cockshutt Plow Co. v. Gray (Sask.), 435.

2. Assignment — Foreclosure — Subsequent Sale — Extinction of Prior Charge in Favour of Assignee—Retention of Lien on Part Unsold — Statute of Limitations—Partnership —Oral Agreement—Registry Laws: John Abell Engine and Machine Works Co. v. Porter (Man.), 470.

3. Foreclosure — Change to Sale before Final Order — Previous Contested Application — Res Judicata — Practice—New Account—Costs: J. I. Case Co. v. Preston (Sask.), 12.

4. Originating Summons for Foreclosure —Order for Sale instead of Foreclosure—Absence of Request—Imperial Chancery Act, 15 & 16 Vict. ch. 86, sec. 48: Canada Life Assurance Co. v. Vance (Sask.), 231.

5. Redemption—Real Property Act—Sale by Mortgagee under Power—Validity —Inadequacy of Price—Valid Contract of Sale—Default of Purchaser —Mortgagor Asking to Redeem before Registration of Transfer to Purchaser — Absence of Fraud—Regularity of Sale Proceedings: Saltman v. McColl (Man.), 146.

6. Sale of Land under Direction of Court — Application of Plaintiff-mortgagee to Cancel — Upset Price Fixed too Low—Negligence of Mortgagee — Refusal of Application — Costs: Fox v. Hunter (Alta.), 87.

7. Second Mortgage—Purchase by Mortgagor at Sale under First Mortgage —Liability under Second Mortgage—Real Property Limitation Act—Husband and Wife—Agency of Husband—Acknowledgment: Mitchell v. Rutherford (Man.), 55.

See Land Titles Act, 3—Vendor and Purchaser, 11.

MUNICIPAL CORPORATIONS.

1. City By-law for Regulating and Licensing Hackmen—Powers of Council—Municipal Ordinance — Cities Act—Delegation of Authority to Issue or Refuse License to Officers of Municipality — Illegality — Restraint of Trade — Public Policy—Damages — By-law not Quashed—Action—Declaration of Invalidity—Injunction: Hall v. City of Moose Jaw (Sask.), 693.

2. Expropriation — Right to Take Land for Purpose of Sinking Well—Compensation — Notice to Claimant — Form of — By-law — Failure to Deposit Plans — Condition Precedent—Town of Vonda Act, 1908, sec. 236: Re Town of Vonda and Mantyka (Sask.), 222.

3. Local Option By-law—Liquor License Act, sec. 62—Petition for Submission of By-law—Signatures—Detachment —Mutilation — Insufficiency — Injunction: Adams v. Woods (Man.), 135, 491.

4. Local Option By-law — Petition for Submission to Electors—Insufficiency —Mutilation—Injunction: Larkin v. Polson (Man.), 144, 491.

5. Local Option By-law—Liquor License Act—Petition for Submission of By-law — Signatures—Opportunity for Fraud—Duty of Council — Injunction: Moore v. McKibbin (Man.), 358.

6. Local Option By-law—Liquor License Act, sec. 62—Petition for Submission of By-law—Signatures—Detachment —Revival of Petition Prepared in Previous Year — Insufficiency — Injunction: Hatch v. Rathwell (Man.), 141, 376.

7. Sewers — Insufficiency — Overflow—Injury to Private Property—Liability: Woodward v. City of Vancouver (B.C.), 156.

8. Waterworks Department—Liability for Negligence of Servant — Injury to Plaintiff by Reason of Servant Leaving Trap-door in Dwelling-house Open—Corporation Acting in Local or Private Capacity—Husband and Wife—Injury to Wife — Action for Damages—Parties: Shaw v. City of Winnipeg (Man.), 622.

See Assessment and Taxes—Contract, 3 —Injunction, 2—Payment.

MUNICIPAL ELECTIONS.

Electoral Roll — Status of Voters—Representatives of Incorporated Company—Representation Limited to one Person—Court of Revision—Excess of Jurisdiction—Certiorari—Misconstruction of Statute — Injunction—Costs: Rex v. Council of the District Municipality of North Saanich (B. C.), 639.

NAME.

See Land Titles Act, 1.

NEGLIGENCE.

1. Finding of Fact—Evidence—Reference as to Damages: Barnet McDonald Lumber Co. v. Union Steamship Co. (B.C.), 642.

2. Ship — Carriage of Passengers and Luggage—Fire Occurring on Ship—Destruction of Luggage and Personal Injuries to Passenger—Escape from Ship by Jumping into Water—Justification—Evidence — Proof of Negligence—Damages — Costs: Isbister v. Dominion Fish Co. (Man.), 508.

See Fire—Master and Servant—Mortgage, 6—Municipal Corporations, 8—Parties, 3—Principal and Agent, 5—Railway, 2, 5, 6.

NEW TRIAL.

See Criminal Law, 4—Master and Servant, 1.

NONFEASANCE.

See Railway, 7.

NOTICE.

See Master and Servant, 9—Railway, 2—Sale of Goods, 4—Vendor and Purchaser, 12, 14.

NOTICE TO PROCEED.

See Practice.

NOTICE TO QUIT.

See Landlord and Tenant, 3.

NOXIOUS WEEDS ORDINANCE.

See Vendor and Purchaser, 11.

OPTION.

See Executors and Administrators — Vendor and Purchaser, 7, 8, 9, 12, 13.

ORIGINATING SUMMONS.

See Mines and Minerals, 5—Mortgage, 4.

OSTEOPATHY.

See Medicine and Surgery, 1.

OVERHOLDING TENANT.

See Landlord and Tenant, 1, 3.

PARENT AND CHILD.

See Distribution of Estates.

PARTICULARS.

See Defamation, 1.

PARTIES.

1. Action by Joint Contractees—Action Begun without the Authority of one—Indemnity against Costs—Practice—Stay of Proceedings—Application to Dismiss—Costs of: Saunders and Marshall v. Tomlinson (Alta.), 73.

2. Action in Name of Foreign Partnership as Plaintiffs—Rule 37—Irregularity—Waiver by Appearance—Substitution by Order of Names of Partners—Practice: Kasindorf Brothers v. Hudson Bay Insurance Co. (Sask.), 285.

3. Joinder of Defendants — Rule 29 — Cause of Action — Separate Torts—Negligence—Pleading—No Allegation on Joint Cause of Action—Review of English and Ontario Decisions: Edinger v. McDougall and York (Alta.), 82.

4. Substitution of Defendants — Mistake as to Identity—Costs: Wilson v. Gallagher (Alta.), 75.

See Bankruptcy and Insolvency, 2—Interpleader—Municipal Corporations, 8—Pleading, 1.

PARTNERSHIP.

1. Dissolution — Account — Division of Profits — Private Speculations and Investments of Partner — Entries in Firm Books—Profits from Speculation with Firm's Moneys—Evidence—Declaration: Kelly v. Kelly (Man.), 365.

2. Promissory Note Signed in Firm Name by Partner for Accommodation of Stranger — Absence of Consideration — Non-liability of Firm and other

Partners — Partnership Ordinance, secs. 7, 9: Morris v. Sobey (Alta.), 558.

See Contract, 6—Mines and Minerals, 6—Mortgage, 2—Parties, 2—Principal and Agent, 1—Settlement of Action.

PASSENGERS.

See Negligence, 2—Railway, 5.

PAYMENT.

Purchase of Lots from City Corporation—Issue of Transfer — Receipt for Purchase Money—Issue of Fact as to whether Money Actually Paid—Evidence—Findings: City of Regina v. Garrett (Sask.), 96.

See Principal and Agent, 5.

PAYMENT INTO COURT.

See Money in Court.

PAYMENT OUT OF COURT.

See Appeal, 2.

PETITION.

See Municipal Corporations, 3-6.

PLANS.

See Railway, 3.

PLEADING.

1. Counterclaim — Parties — New Defendant by Counterclaim—Rule 295—Relief Sought — Specific Performance—Damages: Fernie v. Kennedy (Man.), 48.

2. Statement of Defence—"Not Guilty by Statute"—Leave to Plead with other Defences—Statutes of James I. not in Force in Saskatchewan — Action for False Arrest and Imprisonment: Plested v. McLeod (Sask.), 700.

See Chose in Action — Contract, 10 — Costs, 13—Parties, 3—Railway, 2.

PLEDGE.

See Bankruptcy and Insolvency, 1.

POLICE MAGISTRATE.

See Medicine and Surgery, 1.

POWER OF ATTORNEY.

See Settlement of Action.

PRACTICE.

Delay in Proceeding with Action—Order LXIV., Rule 13—Month's Notice of Intention to Proceed — Order to Amend Writ of Summons—"Step in the Proceedings:" Goldstein v. Vancouver Timber and Trading Co. (B.C.), 154.

See Appeal — Attachment of Debts—Company, 2 — Contempt of Court—Costs — Defamation, 1—Evidence—Husband and Wife, 4—Injunction, 3—Interpleader — Judgment — Mines and Minerals, 5—Money in Court—Mortgage, 3—Parties — Pleading—Settlement of Action — Solicitor—Trial—Vendor and Purchaser, 2.

PRAIRIE FIRES ORDINANCE.

See Fire.

PREFERENCE.

See Bankruptcy and Insolvency.

PREFERENTIAL ASSIGNMENTS ACT.

See Injunction, 1.

PRINCIPAL AND AGENT.

1. Agent's Commission on Exchange of Properties Negotiated for Principal—Exchange Effected with Agent's Partner—Position of Agent Incompatible with Duty to Principal: Onsum v. Hunt (Alta.), 680.

2. Agent's Commission on Sale of Hotel Property — Purchaser Found by Agent — Principal Declining to Complete Sale — Right to Commission: Cuthbert v. Campbell (B.C.), 219.

3. Agent's Commission on Sale of Land—Agent Finding Purchaser — Acceptance by Vendor—Subsequent Cancellation of Sale—Agreement as to Commission — Evidence — Finding of Trial Judge: McCallum v. Russell (Sask.), 267.

4. Agent's Commission on Sale of Land—Failure to Prove Contract of Employment as Agent—Failure to Procure Purchaser Able to Carry out Purchase—Evidence: Coward Investment Co. v. Lloyd (Man.), 497.

5. Payment Made to Agent for Specific Purpose — Misapplication — Negligence—Liability of Gratuitous Agent—Work of Skill: Worsley v. Brunton (Alta.), 531.

See Insurance, 2 — Mortgage, 7—Railway, 2 — Sale of Goods, 4 — Settlement of Action.

PRINCIPAL AND SURETY.

Release of Surety—Duty of Principal to Realise upon Securities—Conditional Sale Agreements—Duty to Exercise Right of Repossession—Transfer of Securities to Surety: Massey Harris Co. v. Graham (Sask.), 593.

See Guaranty.

PRIVATE INTERNATIONAL LAW.

See Distribution of Estates.

PRIVILEGE.

See Defamation.

PROHIBITION.

See Small Debts Court.

PROMISSORY NOTES.

1. Payment — Retirement — Subsequent Reissue under New Arrangement, to Secure Existing Debt — Right of Holder to Recover Amount Due—Action on Note — Amendment: Vachon v. Lefebvre (Y.T.), 203.

2. Signature of Company, Followed by Signatures of Directors — Personal Liability of Directors — Intention — Intrinsic and Extrinsic Evidence: Union Bank of Canada v. Cross and Everard (Alta.), 539.

See Cheque—Fraud and Misrepresentation, 2 — Partnership, 2 — Sale of Goods, 5.

PROMOTION SHARES.

See Company, 1.

PROSTITUTE.

See Criminal Law, 5.

PUBLIC POLICY.

See Husband and Wife, 2—Insurance, 1—Municipal Corporations, 1—Public Schools.

PUBLIC SCHOOLS.

Election of Trustees—Invalidity—Formation of School District—Invalidity of Acts of Trustees — Public Policy—Authority Conferred by Commissioner of Education — Letters of Deputy Commissioner — Illegal Distress for School Taxes—School Assessment Ordinance — School Ordinance — Damages: Macdonald v. Brown (Sask.), 713.

See Assessment and Taxes, 2.

PUBLIC WORKS HEALTH ACT.

See Master and Servant, 3.

RAILWAY.

1. Carriage of Goods—Action for Freight—Contract—Liability of Consignee to Pay Freight—Delivery of Goods as Required by Consignee—Completion of Contract of Carriage: Canadian Pacific R. W. Co. v. Forest City Paving and Construction Co. Sask.), 229.

2. Carriage of Goods — Negligence—Injury to Perishable Goods by Delay in Transportation and Want of Ventilation in Car—Absence of Evidence as to Condition when Shipped—Bill of Lading—Condition Limiting Liability—Form Approved by Board of Railway Commissioners—Dominion Railway Act, sec. 284—No Route being Designated, Carriers Choosing Longer Route—Shorter Route Used in Previous Shipments—"Delay"—Notice in Writing not Given in Time—Waiver—Authority of Station Agent — Estoppel — Pleading — Amendment: Vernon Fruit Co. v. Canadian Pacific R. W. Co. (Sask.), 445.

3. Contract for Sale of Land to Company—Specific Performance — Plan of Subdivision — Registration — Cancellation — Highway — User—Dedication—Way of Necessity — Misrepresentation — Board of Railway Commissioners — Land Titles Act — Railway Act, sec. 88—Easement—Compensation: Grand Trunk Pacific R. W. Co. v. Vincent (Alta.), 403.

4. Expropriation of Land—Compensation—Value of Land Taken—Conflicting Testimony — View by Arbitrators—Award Based on Opinion of Arbitrators Set aside — Appeal—Order of Court Based on Opinions of Witnesses: Re Calgary and Edmonton R. W. Co. and McKinnon (Alta.), 554.

5. Injury to Passenger Alighting from Car at Night—Train Brought to a Standstill, but Car not Opposite Platform — Implied Invitation to Alight — Ignorance of Danger — Absence of Warning—Negligence—Contributory Negligence—Damages: Wray v. Canadian Northern R. W. Co. (Sask.), 726.

6. Injury to Servant — Brakesman—Uncoupling Cars—Railway Act. R. S. C. 1906 ch. 37, sec. 264—Want of Proper Appliances — Evidence for Jury—Negligence: Scott v. Canadian Pacific R. W. Co. (Man.), 328.

7. Neglect to Fence—Injury to Crops on Adjacent Farm by Cattle Trespassing —Railway Act, sec. 306—Time Limitation — Nonfeasance — Injury Sustained by Reason of the Construction or Operation of the Railway—Injury to Land by Contractor Building Railway — Throwing Earth on Land—Damages—Costs: Pempeit v. Canadian Northern R. W. Co. (Alta.), 384.

See Assessment and Taxes, 1—Damages —Master and Servant, 3.

RATIFICATION.

See Settlement of Action.

REAL PROPERTY ACT.

See Mortgage, 5.

REAL PROPERTY LIMITATION ACT.

See Assessment and Taxes, 3—Mortgage, 2, 7.

REDEMPTION.

See Mortgage, 5.

REFERENCE.

See Mortgage, 1—Negligence, 1.

REFORMATION OF CONTRACT.

See Contract, 7—Vendor and Purchaser, 5.

REGISTRY LAWS.

See Land Titles Act—Mortgage, 2.

RELEASE.

See Company, 1—Guaranty—Principal and Surety.

RES JUDICATA.

See Judgment, 3—Mortgage, 3.

RESCISSION.

See Fraud and Misrepresentation, 1—Vendor and Purchaser, 1, 3, 5, 6, 12, 13.

RESPONDEAT SUPERIOR.

See Crown.

RESTRAINT OF TRADE.

See Municipal Corporations, 1.

RESTRAINT UPON ALIENATION.

See Vendor and Purchaser, 14.

RIVERS AND STREAMS.

See Injunction, 4

SALE OF GOODS.

1. Action for Price — Absence of Contract—Conversion — Bailment—Injury to Goods—Liability of Bailee to Account—Costs: Pioneer Fruit Co. v. Litschke (Sask.), 94.

2. Action for Price—Contract—Goods not Delivered in Time—Refusal to Accept—Right to Reject the Whole because Part not Delivered — Trade Custom — Delivery of Larger Quantity than Ordered—Bill of Lading—Retention: Schweiger Co. v. M. Vineberg Co. (Man.), 515.

3. Conditional Sale—Lien Note—Chattel Mortgage — Seizure under—Sale of Goods Subject to Prior Lien—Registration of Lien — Mistake as to Place of Registration—Conversion—Damages: Reinholz v. Cornell (Sask.), 121.

4. Contract — Order given to Agent of Vendors — Condition—Oral Agreement — Acceptance of Terms of Order — Notice — Time—Delivery of Goods — Evidence: Waterous Engine Works Co. v. Wells (Sask.), 706.

5. Promissory Note Given for Price of Machine — Action on, by Indorsees —Defence that Machine not as Ordered—Finding of Fact—Warranty, Express or Implied: Imperial Bank of Canada v. Kievell (Sask.), 308.

6. Written Order—Oral Agreement for Return if not Satisfactory after Fair Test — Return and Acceptance by Vendor: Brownsberger v. Harvey (Sask.), 596.

See Chose in Action—Contract, 5, 10—Fraud and Misrepresentation, 2.

SALE OF HOTEL.

See Principal and Agent, 2.

SALE OF LAND.

See Mortgage, 5, 6 — Principal and Agent, 3, 4—Railway, 3—Vendor and Purchaser.

SASKATCHEWAN MEDICAL PROFESSION ACT.

See Medicine and Surgery.

SCALE OF COSTS.

See Costs, 4, 5, 6.

SCHOOLS.

See Assessment and Taxes, 2—Public Schools.

SEAL.

See Landlord and Tenant, 1.

SECURITIES.

See Principal and Surety.

SECURITY FOR COSTS.

See Costs, 7-12.

SEPARATION.

See Husband and Wife, 2, 4.

SERVICE OF INJUNCTION.

See Contempt of Court.

SERVICE OF PAPERS.

See Mines and Minerals, 5.

SET-OFF.

See Chose in Action—Costs, 6, 13.

SETTLEMENT OF ACTION.

Validity — Authority of Partner of Defendant — Employment of Solicitor —Ratification — Authority of Solicitor to Settle—Power of Attorney —Evidence: Canadian Bank of Commerce v. Donoghue (Sask.), 30.

SEWERS.

See Municipal Corporations, 7.

SHARES.

See Company.

SHERIFF.

Fees—Fi. Fa. Lands — Certificate Forwarded to Registrar of Land Titles without Special Request — Land Titles Act, secs. 92, 93—Judicature Ordinance, Rule 368 — Registrar's Fees—Liability of Advocate of Execution Creditor: Re Solicitors (N. W. T.), 687.

See Costs, 14—Execution, 1—Money in Court.

SHIP.

See Master and Servant, 8—Negligence, 2.

SLANDER.

See Defamation.

SMALL DEBTS COURT.

Jurisdiction—Order for Committal—Action for Damages for Breach of Contract—Prohibition — Objection not Taken at Trial—Appeal Launched but not Perfected—Want of Jurisdiction not Appearing on Face of Proceedings—Manifestation by Affidavit: Re Simpson v. Widrig (B. C.), 643.

SOLICITOR.

Contract — Champerty — Assignment of Judgment — Lien for Costs — Attachment of Debts—Priority of Garnishing Creditors—Costs: Williams v. McDougall (Alta.), 381.

See Costs, 1—Husband and Wife, 1—Judgment, 1—Settlement of Action —Sheriff.

SPECIFIC PERFORMANCE.

See Pleading, 1 — Railway, 3—Vendor and Purchaser, 3, 4, 7, 8, 12.

STAKEHOLDER.

See Interpleader.

STATED CASE.

See Costs, 15—Criminal Law, 2.

STATUTE OF FRAUDS.

See Contract, 7.

STATUTE OF LIMITATIONS.

See Mortgage, 2, 7.

STATUTES.

See Costs, 2—Master and Servant, 3, 6—Municipal Elections — Pleading, 2.

STAY OF EXECUTION.

See Appeal, 2.

STAY OF PROCEEDINGS.

See Costs, 10—Parties.

STOP ORDERS.

See Money in Court.

STREET RAILWAYS.

See Master and Servant, 2.

SUBROGATION.

See Insurance, 2.

SUMMARY JUDGMENT.

See Judgment.

SUMMARY TRIAL.

See Criminal Law, 5.

SUPREME COURT OF CANADA.

See Liquor Licenses.

SUPREME COURT OF SASKATCHEWAN.

See Appeal, 1.

SURETY.

See Principal and Surety.

SURRENDER.

See Landlord and Tenant, 1.

SURVEYS.

See Mines and Minerals.

SYNDICATE.

See Contract, 6.

TAX SALE.

See Assessment and Taxes, 3.

TAXATION OF COSTS.

See Costs, 13, 14.

TAXES.

See Assessment and Taxes.

TENDER.

See Vendor and Purchaser, 3.

THEFT.

See Criminal Law, 4.

TIME.

See Master and Servant, 6—Mechanics' Liens—Mines and Minerals, 4, 5—Railway, 2, 7—Sale of Goods, 2, 4—Vendor and Purchaser, 8, 12.

TITLE TO LAND.

See Vendor and Purchaser, 2, 6, 8.

TORT.

See Parties, 3.

TRADE CUSTOM.

See Sale of Goods, 2.

TRESPASS.

1. Damages—Injury to Fence—Failure of Proof—Nominal Damages: McKeague v. Great West Construction Co., (Man.), 355.

2. Injury to Land—Damages: Oliphant v. Fisher (B. C.), 636.

See Damages—Execution, 1—Mechanics' Liens — Mines and Minerals, 3, 6—Railway, 7.

TRIAL.

Order for Trial by Jury—King's Bench Act, sec. 59 (b) — Discretion—Appeal: McCormick v. Canadian Pacific R. W. Co. (Man.), 363.

See Master and Servant, 1.

TRUSTS AND TRUSTEES.

See Executors and Administrators — Husband and Wife, 2—Judgment, 2—Mortgage, 1—Public Schools.

USE AND OCCUPATION.

See Bankruptcy and Insolvency, 2.

VAGRANCY.

See Criminal Law, 5.

VENDOR AND PURCHASER.

1. Contract for Sale of Land—Abandonment by Purchaser — Cancellation by Vendor — Action by Purchaser for Return of Moneys Paid: Smithneseki v. Wiltsie (Alta.), 533.

2. Contract for Sale of Land—Action by Vendor for Purchase Money—Vendor Acquiring Legal Title before Action — Vendor Equitably Entitled when Contract made — Delivery of Abstract — Condition Precedent — Incumbrances—Practice — Defendant not Appearing — Judgment against, at Trial: Maybery v. Williams (Sask.), 689.

3. Contract for Sale of Land—Cancellation by Vendor on Default of Payment of Instalments of Purchase money—Tender by Nominee of Purchaser—No Assignment to Nominee —Executions against Purchaser Registered upon Land—Refusal of Vendor to Execute Transfer to Nominee — Specific Performance Denied — Right of Purchaser to Return of Moneys Paid on Account of Purchase: Banton v. March (Sask.), 598.

4. Contract for Sale of Land — Correspondence—Uncertainty as to Amount of Purchase Money—Ambiguous Offer by Letter—Acceptance by Telegram—Construction of Documents—Specific Performance Denied: Watson v. Jamieson (Alta.), 667.

5. Contract for Sale of Land—Covenant by Vendor to Prepare Land for Cultivation and Leave Hay on Land—Misrepresentations by Vendor — Amendment—Collateral Verbal Contract—Reformation of Contract and Rescission — Damages — Counterclaim — Interest: Cross v. Douglas (Sask.), 273.

6. Contract for Sale of Land—Inability of Vendor to make Title—Mistake—Right of Purchaser to Rescind—Return of Cash Deposit — Purchaser Taking Possession without License—Compensation for Improvements: Wirth v. Cook (Sask.), 102.

7. Contract for Sale of Land—Mistake of Vendor as to Number of Lot—Action by Purchaser for Specific Performance or Return of Money Paid—Option of Vendor—Election—Interest—Costs: Gwillam v. Lott (Sask.), 4.

8. Contract for Sale of Land—Payment of Purchase Money by Instalments—Default—New Agreement—Construction — Option or Substantive Agreement — Time — Forfeiture — Title — Specific Performance: Jones v. Morris (Alta.), 651.

9. Contract for Sale of Land—Purchase Money in Part Payable by Conveyance of other Land—Option of Payment in Cash—Election—Evidence—Delay: Rowes v. Christie (Man.), 497.

10. Exchange of Lands — Incumbrances Exceeding Amount Represented—Absence of False Representation—Transaction Completed by Conveyance — Merger of Contract — Covenant — Compensation — Warranty —Vendor's Lien: Foster v. Stiffler (Man.), 60.

11. Judicial Sale under Decree in Mortgage Action — Charge for Taxes—Purchaser Taking Subject to—Land Titles Act — Noxious Weeds Ordinance: Canada Permanent Mortgage Corporation v. Martin (Sask.), 440.

12. Option of Purchase of Land—Condition as to Time—Waiver—Continuance of Option — Cancellation—Notice—Specific Performance Refused: Paterson v. Houghton (Man.), 330.

13. Option of Purchase of Land — Payment of Sum Agreed upon as Consideration—Condition not Fulfilled—Cancellation — Evidence: McKinley v. Frank (Man.), 498.

14. Provision that no Assignment by Purchaser be Valid unless Approved by Vendor — Validity—Restraint upon Alienation—Assignment to Plaintiffs without Approval of Vendor—Subsequent Assignment to Another — Fraud — Notice — Equities—Status of Plaintiffs to Maintain Action to Set aside Subsequent Assignment—Evidence — Laches: Sawyer-Massey Co. v. Bennett (Sask.), 249.

See Railway, 3.

VENDOR'S LIEN.

See Injunction, 3 — Vendor and Purchaser, 10.

VERDICT.

See Costs, 2.

VIEW.

See Railway, 4.

VOLENTI NON FIT INJURIA.

See Master and Servant, 4.

VOTERS.

See Municipal Elections.

WAGER.

See Contract, 1—Interpleader.

WAGES.

See Master and Servant, 7, 8—Mines and Minerals, 4, 5.

WAIVER.

See Contract, 3, 9 — Parties, 2 — Railway, 2—Vendor and Purchaser, 12.

WARRANTY.

See Chose in Action—Sale of Goods, 5—Vendor and Purchaser, 10.

WATER AND WATERCOURSES.

See Injunction, 4.

WATERWORKS.

See Municipal Corporations, 8.

WAY.

See Crown—Railway, 3.

WINDING-UP.

See Company.

WITNESSES.

See Evidence.

WORDS.

"Belonging to"—See Assessment and Taxes, 1.
"Books of a Professional Man"—See Execution, 2.
"Deductions"—See Attachment of Debts.
"Delay"—See Railway, 2.
"Discounts"—See Attachment of Debts.
"Jointly"—See Attachment of Debts.
"Just or Convenient"—See Injunction, 3.
"Justly"—See Attachment of Debts.
"Letting"—See Fire.
"Permitting"—See Fire.
"Proceeding" — See Assessment and Taxes, 3.
"Step in the Proceedings"—See Practice.

WORK AND LABOUR.

See Contract—Injunction, 4.

WORKMEN'S COMPENSATION ACT.

See Costs, 3, 12, 15—Master and Servant.

WRIT OF SUMMONS.

See Practice.

YUKON TERRITORIAL COURT.

See Appeal, 2.

YUKON TERRITORY.

See Crown.

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